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'ESPINASSE'S REPORTS

AT

Nisi Prius.

VOLUME IV.

R E P O R T S

OF

C A S E S

ARGUED AND RULED

AT

Risi Prius,

IN

THE COURTS OF KING'S BENCH

AND

COMMON PLEAS,

FROM EASTER TERM, 41 GEORGE III. 1801,

TO HILARY TERM, 43 GEORGE III. 1803,

BOTH INCLUSIVE.

By ISAAC 'ESPINASSE,

OF GRAY'S INN, ESQ. BARRISTER AT LAW.

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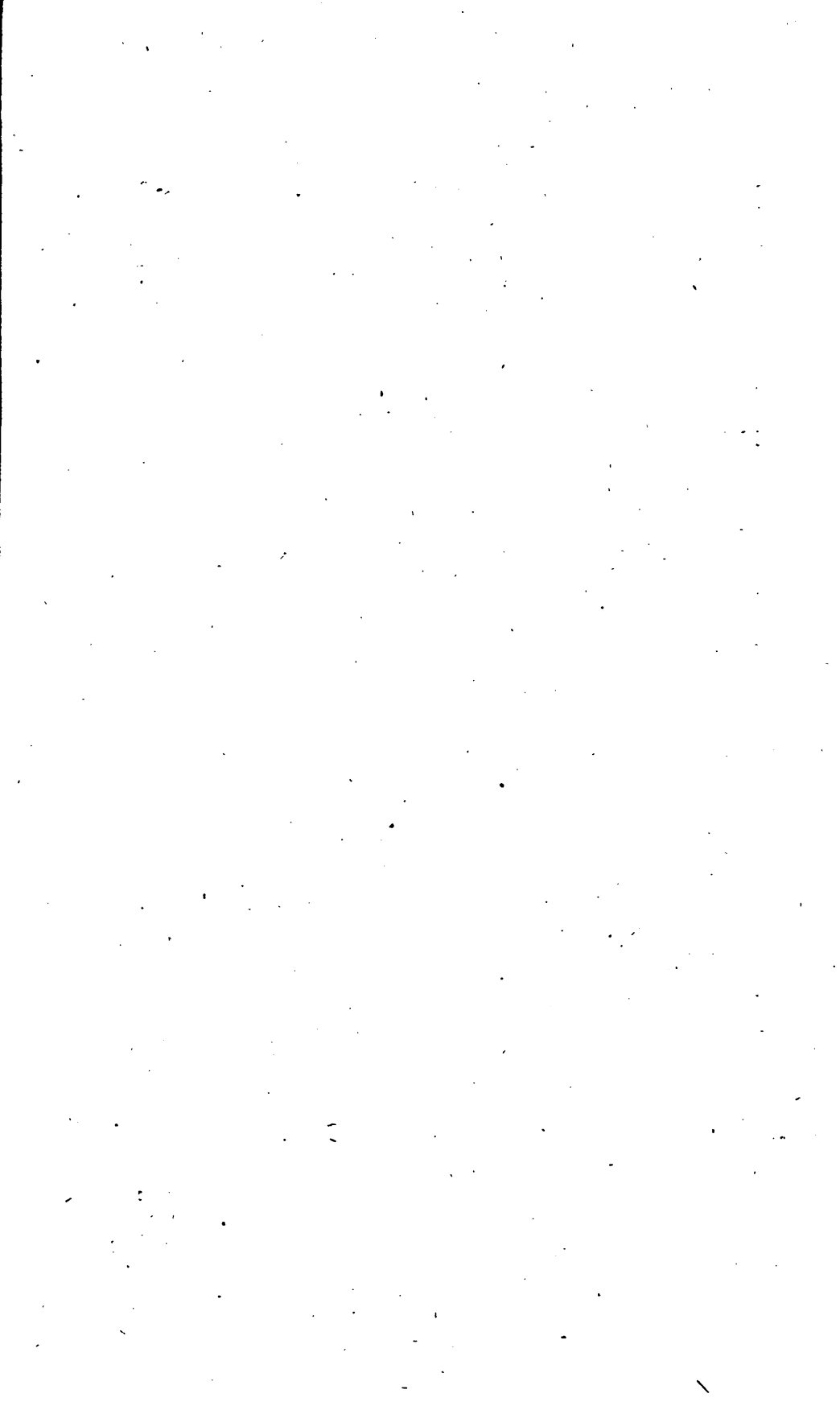
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CASES

ARGUED AND RULED

AT NISI PRIUS.

CHELMSFORD LENT ASSIZES, 1801.
CORAM HEATH, JUSTICE.

EARL, Clerk, v. LEWIS.

March 14.

THIS was an issue, directed by the Court of Exchequer, to try the boundaries of the two adjoining parishes of *High Ongar* and *Stamford Rivers*, in the county of *Essex*.

Under an issue to try the boundaries of a parish, papers handed over to the present incumbent by the representative of his predecessor, as papers belonging to the parish, found in the late incumbent's possession, are evidence.

The Plaintiff produced in evidence, a box of old papers, which were represented to be papers and documents respecting the parish and living of *High Ongar*. His counsel stated, That the Plaintiff had become possessed of them as rector of the parish; they having been handed over to him from the representative of the last incumbent, Mr. *Henshaw*, as papers of that description; and were proceeding to read them in evidence.

This was objected to by the Defendant's counsel, unless further proof was given of their authenticity, and of the mode by which they had come to his hands.

HEATH, Justice, said, Such evidence was necessary.

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The Plaintiff's counsel then called, as a witness, an attorney, who said, That on the death of Mr. *Henshaw*, the last incumbent, his papers had come into the hands of his son: that they were contained in a box: that the son had first separated the private papers belonging to himself, and had then handed over to the witness the papers then produced, as belonging to the parish; and that they were the same papers which he had so received from Mr. *Henshaw* the Younger, and delivered over to the Plaintiff, the present incumbent.

He was asked, If Mr. *Henshaw* the Younger was subpœna'd, or in court, in order to be examined as to the facts to which he had been giving evidence?

This being answered in the negative, the Defendant's counsel objected: That the evidence given was insufficient to establish the authenticity of those papers, so as to render them admissible, unless Mr. *Henshaw* the Younger was called: That he should be called, to give an account of the way in which they came into his hands: to prove that they were papers which had been in his father's possession, as incumbent of the parish; and that they were then in the same state in which they had been found after his father's death.

HEATH, Justice, said, That he was of opinion they were admissible in the form offered, without calling Mr. *Henshaw* the Younger: That the relationship in which Mr. *Henshaw* the Younger stood to the last incumbent, sufficiently accounted for his possession; and he was proved to have handed them over to the attorney, who had been called: and
that

Whenever papers were proved to have been handed over to an attorney, for the purpose of producing them in evidence, it was the course always to admit them in evidence when produced by him: That as to any supposed alteration or addition that might have been made of them,—that was negatived by the witness, who said, They were in the same state in which he had received them from Mr. *Henshaw* the Younger.

Among these papers so produced, was one describing the bounds and limits of *High Ongar* parish. It was in the form of a map, or terrier of the parish; but drawn in an unartificial manner, bearing the appearance of a rough delineation of the limits of the parish, made by the parson, or some person on his account. The metes or bounds were set out with apparently sufficient accuracy; but it was not signed by any person whatever, bearing any public character or office in the parish.

But a terrier or map of the parish, not signed by any of the parishioners, or parish-officers, is not admissible evidence of the boundary of the parish.

The Plaintiff's counsel offered this in evidence, as an old terrier of the parish; and being found among other papers of unquestioned authenticity, respecting the parish, in the possession of the late incumbent, as entitled to be received in evidence; and cited *Buller*, N. P. 248 *.

But

* In *Buller* (N. P. 248) it is laid down, That a terrier of glebe is not evidence for the parson, unless signed by the parson, as well as the churchwardens; nor even then, if they are of his nomination; and even though signed by them, it deserves little credit, unless signed by the substantial inhabitants. Parochial surveys are regularly, in all cases, so signed; in which particular, the terrier produced was defective. But in this case the

CASES AT NISI PRIUS, &c.

But Mr. Justice HEATH rejected the evidence, without hearing the Defendant's counsel.

There was a verdict for the Plaintiff.

Shepherd, Serjt. *Garrow*, and *Trower* for the Plaintiff.

Best, Serjt. and *Marryat* for the Defendant.

terrier produced was intended to bind the adjoining parish ; which could not be ; a survey made by one party, without the privity or consent of another, not being admissible evidence.

Anon. 1 *Stra.* 95.

Vid. et Pollard v. Scot, Peake, N. P. Cases 18 ; where, to prove a place a public road, a copperplate map was produced ; wherein the place in question was described as a public road, and purporting to have been taken by the direction of the churchwardens for the time ; which was generally received in the parish as authentic. Lord KENYON rejected the evidence.

C A S E S

ARGUED AND RULED

AT NISI PRIUS,

IN THE

KING'S BENCH,

IN EASTER TERM, 41 GEORGE III.

THIRD SITTING IN TERM AT WESTMINSTER.

Doe ex dem. MATTHEWSON
v. WRIGHTMAN.

THIS was an action of ejectment, brought to recover the possession of certain premisses in the parish of *St. Giles in the Fields*.

The ejectment was by the lessor of the Plaintiff against the Defendant, who was his tenant, he having given the Defendant a notice to quit.

The notice was given on the 29th of *September*, and was in the following words:

It is not necessary that a notice to quit should be directed to the tenant in possession, if proved to be delivered to him at the proper time.

“ Take notice, that you quit possession of the
 “ rooms and apartments which you now
 “ hold of me, on the 25th day of *March*,
 “ or the 8th day of *April* next ensuing.

(Signed) “ *E. Matthewson.*”

There was no direction of this notice to the Defendant; but it was proved to have been served on the Defendant on the 29th of *September*.

A notice to quit on one of two days is good, as on *Old* or *New Lady Day* is good, if served six months before the day on which the tenancy commenced.

Mingay, for the Defendant, objected to this notice, as insufficient to entitle the Plaintiff to recover : first, That, as the object of it was to put an end to the tenancy, it should appear to be addressed to the Defendant as the tenant by name ; whereas, this notice was addressed to nobody by name. 2dly, That as the notice to quit must, by law, end with the term for which the tenant held, the notice ought to express the time accurately when he was to do so : That here the notice was in the alternative, to quit either on the 25th of *March*, or on the 8th of *April*.

LORD KENYON over-ruled both objections. As to the first, his Lordship said, That the notice to quit was, in point of form, good ; and that it was sufficient to shew that the Defendant was the tenant to the lessor of the Plaintiff, which was necessary in all cases of ejectment by a landlord against his tenant, and had been done here ; and that the service was on him in that character. And, as to the second objection, it was sufficient notice to the tenant to quit if he received it six months before the end of his tenancy ; the notice here was intended to meet an holding commencing either at *Old* or *New Lady-*

Lady-day; and at whichever day it actually commenced, the notice was calculated to meet it; being given on *New Michaelmas-day*, and the demise being laid after the 8th of *April*.

Mingay then contended, that it was incumbent on the lessor of the Plaintiff to shew, That the Defendant's tenancy did commence on one or other of those days correspondent with the notice.

If the tenant disputes the time when his tenancy commenced, that his notice to quit does not correspond with it, it is incumbent on him to shew the true time of the commencement of his tenancy, not on the lessor.

LORD KENYON. The lessee of the Plaintiff is not bound to give any such evidence; it is sufficient for him to prove his having given six months notice to quit, and that the ejectment has been brought after that time was expired: if he has mistaken the commencement of the Defendant's tenancy, so that his notice to quit is, for that reason wrong, the onus of proving the true time of the commencement of the term lies on the Defendant; who thereby defeats the Plaintiff of his right to recover.

The Defendant being unable to give any such evidence, the Plaintiff had a verdict.

Cowley for the Plaintiff.

Mingay for the Defendant.

SITTINGS AFTER TERM.

WADE v. BEASLEY.

May 12.

ASSUMPSIT by the Plaintiff against the Defendant, as executor of *Grace Wade*, deceased.

The first count of the declaration was on a promissory

Where the particular of the Plaintiff's demand was a promissory note only, and, on its being produced

in evidence, it was improperly stamped, and could not be given in evidence, though the party could be allowed to give the consideration in evidence, he shall be precluded by his particular,

promissory note, dated in the year 1784, and given by *Grace Wade* to the Plaintiff. The other counts were the common money ones,

The Defendant pleaded several pleas.

In the course of the cause, the Defendant had taken out a summons for the particular of the Plaintiff, and had obtained a Judge's order for the purpose.

The particular given in by the Plaintiff's Attorney was, "That the action was brought to recover the amount of a promissory note for 100 l., given by *Grace Wade* in her life-time, and payable to the Plaintiff with interest."

The note, when produced, appeared to have been given on an improper stamp; but the Plaintiff gave evidence of a loan of money to the amount of the note, which was the consideration of it, and there rested his case.

Garrow, for the Defendant, objected: That the Plaintiff was not entitled to recover on this evidence. He relied on the particular given in under the Judge's order, which stated the Plaintiff's cause of action to be a note of hand, and contended that he was bound by that particular; and, having failed in evidence of that, he could not resort to another cause of action, and so take the Defendant by surprise,

Erskine e contra contended, That to hold the law to be so, would be to make the particular an instrument of fraud, which was meant to facilitate the proceeding in the cause: That it had been decided at *Nisi Prius* by Lord KENYON, that, where an instrument was found to have an improper stamp, when offered
in

in evidence, the party could go into evidence of the consideration for which the instrument was given : That, in fact, the Plaintiff's cause of action was the same as stated in the particular, since the sum proved to have been lent by the Plaintiff to the testatrix, was the consideration for the note mentioned in the particular of the Plaintiff's demand.

LORD KENYON. Where an instrument produced in evidence has been found to be improperly stamped, I have admitted evidence of the consideration ; and I should do so here, if the Plaintiff had not precluded himself by his particular. The particular is to apprise the opposite party of what he is to come prepared to try ; and the Plaintiff, who gives it, must be bound by it, or particulars are of no use. I would assist the Plaintiff if I could ; but the Defendant having come prepared to meet one demand, must not be called upon to meet another.

The Plaintiff was nonsuited.

Erskine and Espinasse for the Plaintiff.

Garrow for the Defendant.

**CARY *et alt.* Executors of GREATORREX
v. GERRISH.**

ASSUMPSIT by the Plaintiffs as executors for money lent to the Defendant by the testator in his life-time.

Plea of *non-assumpsit*.

The testator had died in the year 1798.

It is not evidence of itself to establish a loan of money by Plaintiff to Defendant, to prove that the Defendant received cash for a draft or check drawn by the Plaintiff

In

on his bankers,
and payable to
him by name out
of money of the
Plaintiff's, then
in the bank.

It was proved that, in his life-time, he had kept cash at the house of *Wright* and Co. who were bankers, and who had also been bankers to the Defendant since the testator's death ; so that the person of the Defendant was well known at the banking-house to the clerks employed there.

To establish the loan of the money by the testator to the Defendant, the Plaintiff then produced a draft drawn by *Greathore* the testator, in his life-time, on *Wright* and Co., his bankers, in the month of *February* 1797, payable to the Defendant ; and it was proved by a clerk in the banking-house, that that draft had been paid to *Gerrish* the Defendant, out of money of the testator, at that time in their hands.

PER LORD KENYON. This is no evidence to establish a debt. No evidence is offered of the circumstances under which the draft was given ; it might be in payment of a debt due by the testator : or the Defendant might have given cash for it at the time. From the circumstance of the Defendant's name being used in the body of the draft, no inference can be drawn ; it is perfectly arbitrary what name is used in drawing a draft on a banker ; a man uses the name which first occurs to him : if the Plaintiff had shewn any money-transactions between the Defendant and the testator, from whence a loan could be inferred, or any application by the Defendant to borrow money at the time, — that, coupled with the giving of the draft, might be evidence to go to the jury ; but standing a naked transaction, as this does,
it

it is not evidence ; and the Plaintiff must be nonsuited.

Garrow and *Espinasse* for the Plaintiff,

Mingay for the Defendant.

TURNER v. HULME.

Friday, May 23.

THIS was an action on a joint and several promissory note.

Plea of the general issue.

The defence intended to have been relied on was, that the note was given for a usurious consideration, under the following circumstances : —

A person of the name of *Banks* had applied to the Plaintiff for the loan of 100 *l.* He refused to advance the money, unless *Banks* would take 25 *l.* part of the money, in goods. *Banks* consented to this ; but, when he was to receive the money, *Turner*, the plaintiff, told him, that he would give him the whole of the 100 *l.* in money ; but that he (*Banks*) must give a note for 25 *l.* for the goods. This *Banks* did, and also gave a note for 100 *l.*, which he received ; but the goods were never delivered : — the whole transaction being to cover usury.

If the payee of a note, given for an usurious consideration, arrests the maker, and, to procure his liberation, a third person joins the maker of the note in another note for the amount of the debt, the usury which affected the first note, cannot be set up as a defence to the second.

Banks being afterwards taken into custody under an execution, on a judgment at the suit of another person in the Common Pleas, *Turner*, the Plaintiff, lodged a detainer against him on the 100 *l.* note. The

exc-

execution and judgment were afterwards set aside ; but *Banks* being detained by reason of *Turner's* debt, *Hulme* (the Defendant in the present action) called upon *Turner*, and represented to him, that he could not recover on the note, the consideration being usurious ; but *Turner* refused to liberate *Banks*, unless he (*Hulme*) and another friend of *Banks's* would join in a note to the amount of *Banks's* debt ; which they consented to do ; and this was the note on which the present action was brought.

Garrow, for the Defendant, contended, That the Plaintiff should be nonsuited : That the consideration for the note for which the present action was brought, was the former note, which had been given on a consideration clearly usurious, and particularly as the note remained in the hands of the usurer, who had notice at the time from *Hulme*, the Defendant, that the original note was void for that account.

But Lord KENYON, on this being so opened, intimated his clear opinion to the contrary : he said, That *Banks*, when the first note had been put in suit by *Turner* against him, should have resisted and defended himself on the ground of usury ; but that the consideration of that note could not be questioned in the present action, unless it could be shown that this was a colourable shift to evade the statute against usury, devised when the money was originally lent, and the first note granted.

Gibbs and *Gaselee* for the Plaintiff.

Garrow and *Burrough* for the Defendant.

BAYNE v. STONE, Executor of STONE.

ASSUMPSIT for money had and received by the testator to the use of the Plaintiff, under the following circumstances : —

Bayne (the Plaintiff) and *Stone* (the testator) had taken a warrant of attorney to confess a judgment for 200 l. from a person of the name of *Hampson* and his brother, for a joint debt due to *Bayne* and *Stone*.

The brother, who was the security, had paid to *Stone*, in his life-time, 127 l. the half of which belonged to the Plaintiff; and to recover which the present action was brought.

The brother was called as a witness on the part of the Plaintiff, and to prove the payment of this money.

The *Attorney General* * objected: That, as this debt arose under a written security, it should be produced and regularly proved; as, otherwise, who the parties were to the warrant of attorney as well as the sum secured by it, would be proved by parol evidence, which could not be legally done.

But it was ruled by Lord *KENYON*, That, although the security was the foundation of the action, the immediate cause of action was money paid to the Defendant's testator, which the party who had been the debtor might come to prove that he had paid to the party sued, without production of the security.

* In the Vacation preceding this Term, *Edward Law, Esq.* was appointed Attorney General, and the *Hon. Spencer Percival*, Solicitor General.

If one of two parties to a warrant of attorney has received the whole of the money, and sees the other for contribution, he may prove the circumstances of the one, and the payment of the money, without the production of the warrant of attorney.

Verdict

Verdict for the Plaintiff.

Garrow and *Lawes* for the Plaintiff;

The *Attorney General* and *Gaselee* for the Defendant.

EDMONSON *q. t. v.* DAVIS *one, &c.*

If an attorney is in partnership with another, and they carry on their business together, and their joint names are put on their papers in causes in their office, either of them is liable to the penalties of the act 37 Geo. III. for practising as an attorney without entering his certificate, though it does not appear that one of them had any profit or advantage from the suit for suing in which the action in *qui tam* is brought.

THIS was an action of debt, *qui tam*, brought to recover from the Defendant several penalties given by stat. 37 Geo. ch. 9. sect. 30, for practising as an attorney, without having registered his certificate.

The Plaintiff proved, That a suit had been instituted by the assignees of *Webb*, a bankrupt, against the present Plaintiff, and shewed the several steps of suing out the writ, declaration, &c. all of which were done under the name of *Davis* and *Plaisted*, *Davis* being the present Defendant; and the names of *Davis* and *Plaisted* were on all the papers and notices in the cause.

Erskine, for the Defendant, cited the words of the statute, sect. 30; by it, it was enacted, That, if any solicitor or attorney should, for or in expectation of fee or reward, do any act without obtaining a certificate, and without entering the same in one of the courts, he should forfeit the sum of 50 £.

He then contended, That, to bring the Defendant within the penalty of the act, he must act with a-view to profit or reward; and that the declaration averred,

averred, for that reason, that the Defendant did the business "for fee or reward." He then stated, That the facts of the case were, That *Davis*, the Defendant, carried on business in partnership with *Plaisted*; That, by the terms of the partnership, *Plaisted* was to have to himself the profits of all the business which arose from his own connexions: That the action for the proceedings in which, by the Defendant, the present action was founded, was commenced and prosecuted by *Plaisted* for his benefit only; and that the Defendant derived no manner of advantage from it whatever.

Which facts were proved by *Plaisted*.

LORD KENYON. This is no answer to the present action: I cannot legislate, but must take the law as it is written for me. It is a hard action; but I cannot say that the Defendant had nothing to do with the original action. The cause is conducted by *Davis* and *Plaisted*; their names are to all the proceedings; the business going through their office is ascribable to both: it is the business of the office, and both would be liable to an action for negligence. It is said, that *Davis* has no interest in the suit carried on by *Webb's* assignees, but that the whole belonged to *Plaisted*. He may have no immediate benefit from this suit; but may he not have benefit from it in another way, from some other arrangement in the partnership? But he has held himself out to the world as the attorney in the cause; and, I think, he must be deemed so.

There are counts in the declaration for penalties, for wrong steps taken in the cause. It seems to be
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an harsh construction of the statute to allow a penalty for every step taken in the cause; but I do not mean to be bound by this as an opinion that the Plaintiff is not entitled to recover more than one penalty.

The Jury found a verdict for one penalty.

Gibbs and Larves for the Plaintiff.

Erskine and Garrow for the Defendant.

WYNDHAM, Esq. v. Lord WYCOMBE.

If a married man neglects the society of his wife, and openly lives with other women, in the apparent practice of adultery, he can bring no action against another for criminal conversation with his wife.

THIS was an action for criminal conversation with the Plaintiff's wife.

The adultery was proved to have taken place in the year 1795, at which time the Plaintiff was the British Envoy at *Florence*.

The defence relied on for the Defendant was the open and notorious infidelity of the Plaintiff to his wife, and a total neglect of her society: That his gallantries with other women were open, public, and undisguised: That he had attached himself to a Lady at *Florence*, of the name of *Madame Bartioli*; appeared with her constantly in public, and at the opera, when his wife was absent: That *Madame Bartioli* was esteemed a woman of loose principles, and that little doubt was entertained of an intrigue subsisting between them; and that he took no pains to disguise his attachment to her; shewing her

her those attentions in the presence of Mrs. *Wyndham*, his wife.

This was opened by *Garrod*, of counsel for the Defendant; and, in the course of his address to the jury, he stated, That, if the facts stated were substantiated by evidence, he relied on the law as delivered by Lord *KENYON* in the case of *Sturt v. the Marquis of Blandford*, which had been tried at the sittings after the preceding term, as furnishing a complete answer to this action. In that case his Lordship had ruled, " That, though in an action for criminal conversation with the Plaintiff's wife, the gallantries of the husband before marriage could not be brought into question, or given in evidence, because the wife had married a rake with notice, and might have done so with a view to reclaim him; if, however, after marriage, the husband openly violated all those rules of conduct which decency required, and affection exacted from him; if he openly practised his gallantries without regard to his wife, and violated the marriage-bed, so as to create disgust or unhappiness in his wife; that such a husband could not come into a court of justice for damages, or complain of the loss of the society of a wife which he never courted or enjoyed; and that, of course, such conduct on the part of the husband went to the ground of the action.

Lord *KENYON* assented to the statement, and said, he had so ruled in the case of *Sturt v. Marquis of Blandford*; and that such was his opinion in point of law.

In the course of the evidence, it appeared that the gallantries of the Plaintiff had been while he

resided in *Florence*, open, undisguised, and notorious: That he had publicly appeared with *Madame Bartioli* as a mistress: That he had also taken a house for a *Madame Mari*, which he had furnished, and had notoriously kept her as a mistress.

The *Attorney General*, who led for the Plaintiff, on this evidence being given, consented to be nonsuited.

The *Attorney General*, *Erskine*, and *Tripp*, for the Plaintiff.

Garrow, *Gibbs*, and *Jekyll*, for the Defendant.

COMPTON v. CHANDLESS one, &c.

If the Plaintiff in an action to recover the consideration of an annuity, states that a warrant of attorney, part of the securities, was set aside, it must be proved; it is not sufficient to produce the rule of court by which it is set aside.

THIS was an action on the case, against the Defendant, charging him, as attorney for the Plaintiff, with negligence.

The negligence imputed to him by the declaration was, That an annuity having been granted to the Plaintiff, he had been employed as his attorney to prepare the securities, and to enroll the memorial. It then charged, That he had so negligently and improperly caused the memorial to be enrolled, that, by reason of a defect in such memorial, the securities had been set aside by rule of court, and the Plaintiff had lost the benefit of his annuity and the money paid for the same.

The Defendant pleaded, 1st, Not guilty; and, secondly, The Statute of Limitations, that the cause of action did not accrue within six years.

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The Plaintiff had assigned the annuity to one *Kirkby*. The annuity had been set aside; and *Kirkby* had brought an action against the Plaintiff for the consideration money, which he had recovered back. This had taken place within six years. The annuity had been granted the 20th of *November* 1787.

The Plaintiff's counsel produced, from the office, the original memorial, as prepared by the Defendant. This it was proved was copied on a roll; but it was not proved to be examined. They also produced an examined copy from the office, of the original memorial.

Gibbs, for the Defendant, objected: That this did not prove the averment in the Declaration, which stated, "that the Defendant had caused a memorial to be enrolled:" if the parchment produced had issued from the office, or was an examined copy, it would be good; but this was neither.

Per Lord KENYON. I think this evidence sufficient; at least I shall not stop the cause for it. In the case of conveyances by bargain and sale enrolled, I never knew the enrollment proved; the deed produced, with the enrollment indorsed, and that has been held to be sufficient: this is to the same effect.

The declaration stated, among the other securities which had been set aside, a warrant of attorney from the grantor to the Plaintiff, who was the grantee of the annuity.

The Plaintiff proved an office-copy of the judgment, signed under the warrant of attorney, and the rule of court by which the deed bond and war-

rant of attorney were set aside; but the warrant of attorney was not produced.

It was objected by *Gibbs*, that it was necessary to be produced, as being set out in the declaration.

It was answered by *Garrow*, for the Plaintiff, That as against the Plaintiff this evidence was sufficient, he being the attorney to whom the warrant of attorney was delivered, for the purpose of entering up the judgment, and the rule, stating that it had been set aside, was sufficient evidence of its existence.

Lord KENYON intimating that he thought it necessary, *Garrow* said, The Defendant had notice to produce it; which Lord KENYON said would do.

The notice was produced and read, and it was to produce bills of costs and copies of securities.

Lord KENYON said, He was clearly of opinion, that the warrant of attorney ought to have been produced; it was a material averment in the declaration, which it was necessary to prove, and that neither the rule nor notice supplied it; the Plaintiff should therefore be called. As to the plea of the Statute of Limitations, his Lordship said, he had not made up his mind on it; but the inclination of his opinion was, That the plea was insufficient: That in the case of an action of trover, if goods are left in the hands of another, the Statute of Limitations does not begin to run from the time of delivery, but from that of the demand and refusal,

Garrow and *Comyn* for the Plaintiff.

Gibbs and *Wigley* for the Defendant.

SITTINGS.

SITTINGS AFTER TERM AT GUILDHALL.

JOHNSON v. GILSON.

June 1, 1801.

ASSUMPSIT on a policy of insurance on the ship
Superb, on a voyage from *Lisbon* to *Charlestown*.

The Defendant had given the Plaintiff notice to produce a letter.

It was called for at the trial, and produced and read. It mentioned, among other things, that it covered several papers inclosed in it.

These papers were produced, together with the letter; and the Plaintiff's counsel contended, That they should also be read in evidence, as part of that called upon by the notice to be produced; the notice to produce the letter being a notice to produce whatever it contained relative to the business in question, as well as the contents of the letter itself; which was of course made evidence by the notice.

Per Lord KENYON. If the letter refers to the papers which it covers; that is, refers to them in such a way, that it is necessary to incorporate the papers inclosed with the body of the letter, in order to make it intelligible, or the sense complete; in that case, the papers inclosed would be, by the notice, made evidence, and admissible; and the party who produced the letter and the inclosure, would have a right to have the whole read; but independent papers, not referred to by the letter, but which it

Under a notice to produce a letter, which is produced, and mentions that it covers other papers, those papers are not thereby made evidence, unless they are referred to in the letter.

only covers,—such papers are not thereby made evidence.

Verdict for the Defendant.

Erskine, Gibbs, and Giles for the Plaintiff.

The *Attorney General* and *Garrow* for the Defendant.

Same day.

WHITE v. BARING, *et alt.*

The captain of a ship, who has entered into engagements on account of the ship, thereby acquires a lien on the goods and on the freight to the extent of his engagements.

THIS was an action of assumpsit, brought on a bill of lading, by the Captain against the Defendants, as consignees of the cargo, to recover the amount of the freight and primage.

The Defendants pleaded the general issue; and set up the following defence:—

The ship belonged to *Maillard* and Co. She had been chartered on a voyage from *London* to *Surinam*, and back. The Defendants were the consignees for the voyage; and as such, liable for the freight.

The voyage was performed; and, after the ship's arrival, the Defendants paid over to the assignees of *Maillard* and Co. the amount of the freight, they having become bankrupts; but this payment was made by the Defendants after they had received a written notice from the captain (the Plaintiff) not to do so, as he was liable for the payment of several debts, on account of the ship; and, therefore, claimed to be paid the freight for the purpose of discharging those debts, as well as the primage; which

which was a personal demand in his character of captain.

The Defendants counsel contended, That the claim made by the captain was not a legal one: That the owners were the persons who were legally intitled to the freight; and that, therefore, the payment having been made to them, it was a complete discharge to the Defendants.

The Plaintiff's counsel, on the other hand, relied, That the contract in question having been entered into between him and the consignees, and he having entered into different contracts on account of the ship, on the faith of the freight being paid to him, and made himself liable to the payment of debts on account of it, that he had a right to receive the freight to cover such engagements; and cited *Garnham v. Bennett*, 2 *Stra.* 816, and *Rich v. Coe*, *Cowp.* 636.

Per Lord KENYON. The creditor of a ship has a threefold security: the ship itself, the owners, and the captain. The captain is liable by reason of the contracts into which he enters on the ship's account; but having contracted and made himself liable for articles furnished to the ship; he thereby acquires a lien on the goods, as well as freight: and I am of opinion, That his lien is co-extensive with his liability to the ship's creditors. If, therefore, the Plaintiff can shew that goods were furnished to the ship by his direction, and on his credit and account, I shall hold his lien on the freight to extend so far; and, of course, that the payment to that extent, made by the Defendants, has been made in their own wrong.

CASES AT NISI PRIUS,

The Plaintiff proceeded to give this evidence ; and called a witness of the name of *White*, who had furnished goods on the ship's account, to prove the furnishing of the goods ; and that he had given credit to the Plaintiff, and not to the owners, for the amount of them.

Gibbs, for the Defendant, objected : That he was an inadmissible witness, on the ground that he was interested in establishing the demand against the captain, inasmuch as the object of the present action was to give the Plaintiff a right to recover against the present Defendants, by reason of the Plaintiff's liability to the witness ; if he, by his testimony, did enable the Plaintiff to obtain a verdict, he thereby created a fund for the payment of his own debt.

Lord KENYON over-ruled the objection. He said, It was the case of every creditor who was called as a witness for his debtor. The debtor was, by the effect of a verdict in his favour, better able to pay his debts ; but it was not an interest that went to the competence of a witness, whatever it might do to his credit.

Verdict for the Plaintiff.

The *Attorney General* and *Harrison* for the Plaintiff.

Gibbs, *Stephens*, and *Lawes* for the Defendant.

A rule for a new trial was moved for and obtained in this case, on the ground of a mistake in the Judge in point of law ; but the cause was afterwards settled, so that no determination of the Court of King's Bench was had on it.

SMITH

SMITH v. SURRIDGE.

THIS was an action on a policy of insurance on the ship *Resolution*, at and from *Pillaw* to *London*; effected the 15th of *May*, 1800. The ship had arrived at *Pillaw* on the 13th of *May*. It became necessary, while there, to repair her: and she was there accordingly thoroughly repaired, and ready to take in the cargo on the 27th of *June*. Part was taken in on the 1st of *July*. At that time the water was uncommonly low; so much so, that the vessel could not get over the bar. It so continued till the 10th of *August*, when she attempted to sail; but was unable to do so; and did not sail till *November*, when the loss happened.

Erskine, for the Defendant, made two points:—
1st, That there was voluntary delay on the part of the Plaintiff, and such a variation in the risque insured, by which the underwriters were discharged, as they had insured a summer, and not a winter voyage: That the insurance was effected in *May*; of course the underwriters had reason to suppose she would then, or soon after, sail; whereas she did not sail till *November*: That though the Plaintiff endeavoured to account for it from the want of water, in fact, it arose from the state of repair in which the ship was: That she was in such a state of repair, as made it necessary to occupy a considerable length of time in repairing her; having done so, that when she attempted to sail, she was unable; whereas she

Though unnecessary delay may avoid a policy, that shall not be deemed so which is employed in necessary repairs, if the policy is "at and from the place."

had she not wanted the repair, she might have failed immediately ; so that that was such delay as discharged the policy.

He then objected : That there was not sufficient property in the Plaintiff to sustain the action. He stated as to that, the facts to be, That the vessel was a *Dutch* ship, taken by the *French*, and carried into *Bergen* in *Norway* ; where she was condemned by a *French* court sitting there. He produced a bill of sale, dated the 10th of *April*, 1799, to a *Danish* subject, under the sentence of the Court of Admiralty at *Bergen*. This he contended to be contrary to law ; and there was another bill of sale from the purchaser to the Plaintiff *Smith*.

Lord KENYON over-ruled both objections. His Lordship said, That, if there was any voluntary delay on the part of the Plaintiff, there was no doubt it would avoid the policy ; but he saw none here. The policy was *at* and from *Pillaw*. Such a policy, *at* and from a place, attached on the ship while she was undergoing repairs ; it was not necessary that she should be sea-worthy at the time of the insurance. The underwriter took into his consideration the time she might be necessarily detained there. She did undergo repairs, which were necessary ; and when she was ready to sail, there was an unusual want of water, which prevented it. It was from this cause the delay proceeded ; it was not a voluntary delay, nor such as amounted to a discharge of the policy.

As to the second point, — The sentence of a *French* court, in a country out of the jurisdiction
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of *France*, had been wisely held not to change the property; but when it had been acquiesced in in that country, it might make a difference; and from the time of the sale under such decree, the property was regularly brought down to the Plaintiff.

Verdict for the Plaintiff.

Gibbs and Giles for the Plaintiff.

Erskine, Scarlett, and Gaselee for the Defendant.

SITTINGS AFTER TERM IN THE COMMON PLEAS

CARROL v. BLENCOW, Esq.

June 3, 1801.

THIS was an action of assumpsit, for goods sold and delivered.

The defence relied upon was, — That the Plaintiff was a married woman.

The Plaintiff's counsel answered this case so attempted to be set up, by producing the record of the husband's conviction for felony, in the month of *March*, 1794, and of a sentence of transportation for seven years; from whence they contended, That he had abjured the realm; and so the action was maintainable by the wife as a *feme sole*.

It was answered by the Defendant's counsel, That by the Plaintiff's own shewing, no right of action then subsisted in the Plaintiff; for that the sentence being for seven years, from *March* 1794, that time

A married woman, whose husband has been transported for seven years, may maintain an action as a feme sole, on the ground of the husband having abjured the realm, even though the term of his transportation has expired.

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was now expired; so that the husband was now a *liber* and *legalis homo*, and competent to sue.

Lord ALVANLEY said, That by the record of the conviction and sentence produced, there was conclusive evidence to support the right of action in the Plaintiff, as a *feme sole*, it appearing thereby that the husband had abjured the realm; and though the term of his transportation had expired, if in fact he had not returned, the right of action remained: but that if the Defendant meant to rely that he had so returned, by which the Plaintiff's right of action, in her sole capacity, would be at an end, the proof of that lay on the Defendant.

No evidence was offered to that effect, and the Plaintiff had a verdict.

Cockell, Serjt. and *Manley* for the Plaintiff.

Shepherd, Serjt. and *Reader* for the Defendant.

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BENNET v. FRANCIS.

Though goods have been tortiously taken, if the owner chuses to consider the taking as a sale, and delivers a bill of parcels for the value, which the person having the goods receives, and on an action brought, as for goods sold and delivered, pays money into court, he cannot set up the tortious taking as a defence to the action.

ASSUMPSIT for goods sold and delivered, money had and received, with the other common counts.

The Defendant pleaded, 1st, *Non-assumpsit*; and 2dly, A tender of the sum of 4 *l.* 3 *s.*; which was paid into court.

The Plaintiff admitted the tender, and went for further damages.

The circumstances of the case were these:—
The Plaintiff and the Defendant were hide-salesmen in *Leadenhall Market*, and occupied adjoining stalls,

halls, where their skins were exposed. On the 23d of *December*, the Plaintiff received, from two butchers, two different parcels of skins; three in number each. One parcel was marked with a W; the skins in the other parcel had each a slit on the ear. They were thrown into two heaps on his stand.

The Plaintiff's servant having occasion to leave the stand for a short time, on his return he missed the skins; and, on searching for them, he found two with the mark of the W among some skins of the Defendant, which he claimed and identified; and they were restored to the Plaintiff. The third with that mark, the Defendant admitted that he had sold for 1*l.* 12*s.*

With respect to the two others, the Plaintiff's servant proved, That two skins, with a slit in the ear of each, were found among the skins of the Defendant; and corresponding in the colour and marks with those lost by the Plaintiff. These were also demanded of the Defendant; but he refused to deliver them up, saying, That they had been sent to him by a customer of the name of *Paul*; and that they did not belong to the Plaintiff.

The Plaintiff then sent him a bill of parcels, charging him for the price of the skins, and then brought the present action for goods sold and delivered; to which the Defendant pleaded as above.

The facts stated were proved, when the counsel for the Defendant contended, That the Plaintiff had mistaken his form of action, and that the present action could not be sustained, there being no
presence

pretence for setting up any contract for the sale of the skins, as between the Plaintiff and the Defendant: That the evidence, if it proved any thing, established a tortious conversion by the Defendant; and that of course the action should have trover.

It was answered by the Plaintiff's counsel, That whatever might have been the original ground of action, arising out of the mode by which the Defendant had become possessed of the Plaintiff's skins, it now could avail him nothing, he having pleaded a tender, and paid money into court; by which he had admitted a contract, and was precluded from considering the transaction in any other light; and cited *Gutteridge v. Smith*, 2 *Hen. Black.*

CHAMBERE, Justice. Whenever a party has lost his goods, and they are proved to have come to the possession of another, he has by law a right to consider the transaction as a tort, and to bring an action of trover for them; or he may affirm the rightfulness of the possession, and sue in contract for the value. This is the common case in bankruptcies. In the present instance, though there does not appear to have been any contract for the sale of the goods in question; but, on the contrary, the Defendant seems to have got possession of the goods by mistake, or perhaps tortiously; so that trover would have been the action most proper to have been brought, I am of opinion, That the Defendant cannot now set up any such objection; but that, on the contrary, he has admitted that there was a contract of sale, by receiving a bill of parcels, and paying money into court.

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The Defendant desired the point to be reserved.

The Plaintiff had a verdict.

Best, Serjt. and *Espinasse* for the Plaintiff.

Vaughan, Serjt. and *Reader* for the Defendant.

In the next Term the point was moved, and a rule obtained ; but the Court of Common Pleas concurred in opinion with the learned Judge.

C A S E S

ARGUED AND RULED

IN TRINITY TERM, 41 GEO. III.

IN THE

KING'S BENCH.

FIRST SITTING IN TERM AT WESTMINSTER.

DICKINSON v. PRENTICE.

In an action on a bill of exchange against the acceptor, where the defence is forgery, which is imputed to him by the drawer, the drawer may be, notwithstanding, a good witness to prove the Defendant's handwriting to the acceptance.

ASSUMPSIT on a bill of exchange, drawn by one *Frederick Smith* on the Defendant, and accepted by him.

The defence intended to be set up was, That the acceptance was a forgery.

To prove the Defendant's hand-writing, the Plaintiff's counsel called *Smith*, the drawer of the bill.

Garrot, for the Defendant, objected to his competency, on the ground that the bill being drawn by the witness, and which was not denied by him, the forging of the Defendant's acceptance was only imputable to him; and that, as in case the jury found the bill to be a forgery, he might be committed and tried for a capital offence: the influence that that might have on his testimony, ought to disqualify him.

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Per Lord KENYON, If any interest in the event of this cause could be brought home to the witness, or the verdict in it could be given in evidence in his favour in another cause, that might disqualify him; but I see here no interest sufficient to impeach his competency. The objection to the competency of a witness arises from his having a civil interest, not from any bias he may have from an apprehension that the testimony which he is about to give, may have an effect in a criminal proceeding. That is matter of observation, as to his credit; but it is no objection to his admissibility.

The witness was admitted, and the Plaintiff had a verdict.

Erskine and Co. for the Plaintiff.

Garrow for the Defendant.

PENTON v. ROBERT.

THIS was an action of trespass, for breaking and entering the Plaintiff's yard; and taking and carrying away a building therein erected, and the several materials belonging to it.

The question in the case was, Whether the building taken away by the Defendant, was of that description which a tenant was authorized to remove at the expiration of his term, and on his quitting the other premises demised by the Plaintiff?

The building in question consisted of a brick basement, of about two feet high, sunk into the
VOL. IV. D ground.

Though a building may be raised on a brick foundation, and have a brick chimney, if the erection on such foundation is of wood, and the building be used for the purpose of trade or manufacture, the tenant may remove it at the end of his term.

ground. A wooden plate was laid on the brick, and the quarters were morticed into it. It was twelve feet high in front, and seven in breadth. There was a large brick-chimney, with iron plates round it, and staunchions. It was for carrying on a varnish manufactory. There were boilers used for the carrying it on ; which were also set in brick-work.

The Defendant's counsel relied on the latitude of modern decisions upon this head ; as allowing all erections for the benefit of trade, to be removed by the tenant on the expiration of his term.

For the Plaintiff, it was insisted, That this was a permanent erection, sunk into the ground, with a brick-chimney, and raised on a brick foundation ; that this, therefore, annexed them to the freehold, and defeated the right which the tenant might otherwise have had to remove erections merely made of timber, for the convenience of trade.

LORD KENYON. The mere erection of the chimney will not prevent the right of taking away the rest of the building which surrounded it, where the trade was carried on. In the case of a noble family of this country, *Dudley v. Dudley*, a steam-engine, to which a chimney necessarily belonged, was held to be removeable. Modern determinations have, for the benefit of trade, allowed many things to be removed ; which the rigor of former determinations, considering them as fixed to the freehold, prohibited. The case of cyder-mills is familiar to us all. The construction ought to be favourable to the tenant ; and my opinion is, That he was warranted
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in removing the building in question; but I will reserve the point.

In this case, the premises had been originally demised to one *Cotterell*; who had underlet them to the Defendant. The term expired at *Michaelmas*; and the Defendant had entered after that time, and removed the building.

Mingay, for the Plaintiff. At all events, the Defendant is a trespasser for this entry. The term was expired, and he had no right afterwards to come on the premises, which were then in possession of the Plaintiff.

Per Lord KENYON. Where the tenant has by law a right to carry away any erections, or other things, on the premises which he has quitted, the inclination of my mind is, That he has a right to come on the premises, for the purpose of taking them away: but as to this point, the Defendant has let judgment go by default.

Mingay and *Reader* for the Plaintiff.

Garrow for the Defendant.

In the next term, the case came before the court of King's Bench, when it was decided, That the building in question might lawfully be removed by the tenant. Vide 2 *East's Rep.* 88.

SITTINGS AFTER TERM AT WESTMINSTER.

DAVIES v. SMITH.

Where to a demand of a debt above ~~six~~ years standing, the party, on being applied to for payment, says, "I think I am bound in honour to pay the money, and shall do it when I am able," is a conditional promise only, and not an absolute one to take it out of the statute of limitations.

ASSUMPSIT by the Plaintiff, as holder of a bill of exchange, drawn by the Hon. C. Cary, and accepted by the Defendant.

The Defendant pleaded, 1st, *Non-assumpsit*; 2d, *Non-assumpsit infra sex annos*.

To prove a new promise within ~~six~~ years, the Plaintiff called a witness, whose evidence was, That the Defendant, on being applied to for payment of the note, said, "I think I am bound in honour to pay *Davies*; and I shall pay him when I am able:" and this was relied upon as sufficient evidence to sustain it.

For the Defendant, it was contended, That it was a conditional promise only, in case of his ability to pay; and that that should be shewn in evidence.

Lord KENYON ruled, That it was a conditional promise only; and that the Plaintiff was bound to shew that the Defendant was then of sufficient ability to pay; adding, That it had been so ruled before by Lord Chief Justice EYRE.

The Plaintiff's counsel then stated, That the evidence which they had to offer, was, That, by the death of his grandfather, the Defendant had become possessed of 8000 *l.* under his will.

Per

Where a Defendant has made a promise to pay a debt when he is able, it must be shewn that he was able at the time when the action was brought

Per Lord KENYON. That is not sufficient. The Plaintiff should shew that the Defendant was of sufficient ability to pay when he was sued. I remember a case in which Serjt. *Nares* was of counsel, which turned upon this point : he contended, That every man was able to pay his debts, for *solvat per corpus, qui non potest crumená* ; but that distinction is too fine.

They then called a witness to prove the interest which the Defendant took under his grandfather's will. He did so ; but, on his cross-examination, he said, That whatever benefit he might have derived under the will, he was then in debt infinitely beyond it ; and was, in fact, in consequence of his difficulties, forced to live out of the kingdom.

Lord KENYON, on this evidence, nonsuited the Plaintiff.

Erskine and *Espinasse* for the Plaintiff.

Garrow for the Defendant.

GARRELLS v. ALEXANDER.

July 1.

ASSUMPSIT on a foreign bill of exchange.

To prove the hand-writing of the Defendant, the Plaintiff called the clerk of the Defendant's attorney.

His evidence was, That he had seen the Defendant sign the bail-bond in the cause ; but had never seen him write on any other occasion. Being asked, Whether he believed the acceptance to be

In an action on a foreign bill of exchange, to prove the hand-writing of the Defendant, it is evidence to go to the jury, that a person who saw him write once, thinks the hand-writing alike, though he has no belief on the subject.

Aliter, if he had never seen the party write : mere comparison of hands would not be admissible evidence.

the hand-writing of the Defendant, he said, He could form no belief on the subject ; it was like the hand-writing in which the bail-bond was subscribed ; and he was about to compare them together.

Lord KENYON told him, He must form a judgment without such comparison of hands.

He then looked again on the bill, and said, It was like the hand-writing in which the Defendant had subscribed the bail-bond ; but that he could not speak to any belief further than he had already done.

Garrow, for the Defendant, objected : That there was not sufficient evidence ; and that it would be of dangerous consequences to allow such loose evidence of a hand-writing to charge a party with a debt.

LORD KENYON. This is the case of a foreign bill of exchange ; and, I think, there is evidence to go to the jury ; and that I am bound to leave it to them. To be sure, mere comparison of hands is not admissible evidence of itself : that was *Algernon Sidney's* case ; but there the witness had never seen him write ; and the only evidence in the case was, mere comparison of hands : but in the present case, the witness has seen the Defendant write, and he speaks to the likeness which the hand-writing, in which the bill is accepted, bears to that which he has seen the Defendant actually write. I therefore think that it is evidence to go to the jury.

The jury found for the Plaintiff.

Mingay and *Parnther* for the Plaintiff.

Garrow for the Defendant.

EDWARDS v. CROCK.

JUNE 26.

THIS was an action on the case, for criminal conversation with the Plaintiff's wife.

The Plaintiff in the action, was butler to Lord *Harewood*; and lived at the time of the adultery imputed to the Defendant, at his master's seat in *Yorkshire*.

The Defendant was steward to Mr. *Coke*, of *Holkham*, in *Norfolk*; where the Plaintiff's wife lived in the capacity of housekeeper.

To prove that, previous to the wife's adulterous intercourse with the Defendant, she and the Plaintiff had entertained sentiments of great affection for each other, *Erskine*, for the Plaintiff, stated, That from the situation of the parties, both being in the station of servants, and necessarily living apart, he was deprived of any ability of proving by the usual evidence in those cases: — That the husband and wife lived together, previous to the adultery, in habits of mutual affection and happiness; but that as their living apart was not the effect of choice, but of necessity, and entitled the husband equally to the protection of the law, he proposed to give in evidence, letters written by her to him, while in different services, expressive of affection and attachment to him. This he relied upon was evidence; particularly as Lord KENYON had before ruled, That expressions of affection and regard used by the husband and wife in each other's presence, was admissible.

Where the husband and wife necessarily, from their situations in life, live separate, and the wife commits adultery, letters written by her during their separation, but before any suspicion of misconduct in the wife, is admissible evidence to shew that the husband and wife lived in a state of conjugal affection previous to the adultery; but the time when the letters were written must be shewn.

The Attorney General, for the Defendant, opposed its admissibility, on the ground that it might possibly be turned to a very dangerous purpose, by the husband and wife's entering into a collusive correspondence, full of sentiments of assumed affection, for the purpose of increasing the damages in an action for adultery.

LORD KENYON said, He thought the evidence was admissible; but that it should be confined to letters written before there was any suspicion of adultery committed by the wife: That as the only objection seemed to be possible collusion, that was obviated by the exclusion of all evidence of that description, subsequent to any suspicion attaching on the wife: That he should therefore, before he admitted the letters to be read, expect to have it accurately ascertained, when, and under what circumstances they were written, in order to shew, that at that time there was no suspicion of misconduct in the wife.

The Plaintiff was unprepared with evidence to that effect, or when the letters were written; and LORD KENYON refused to receive them in evidence.

Verdict for the Plaintiff.

Erskine and Wigley for the Plaintiff.

The *Attorney General* and *Holroyd* for the Defendant,

SITTINGS AFTER TERM AT GUILDHALL

HARRIS v. MORRIS.

July 7, 1801.

THIS was an action of assumpsit, brought to recover a sum of money, claimed by the Plaintiff for meat, drink, and other necessaries furnished to the Defendant's wife.

The Plaintiff's counsel stated, That the wife having been turned out of doors by the Defendant, had taken shelter with the Plaintiff; where she was entertained, and furnished with necessaries.

The Defendant denied that she was turned out; but relied on her having been seen in improper familiarities with a person living near her house, though he could produce no proof of actual adultery: That she had formerly eloped for adultery, and been in the *Magdalen Asylum*; but that he had afterwards taken her back: That he had advertised her in the newspapers, and cautioned persons from trusting her on his credit: Lastly, That he was a journeyman tradesman, and incapable of making her any allowance.

In answer to the last matter relied on by the Defendant, it was proved, that the Defendant had said, That his wife had ten guineas a year, independent of him; and that he could allow her 5 s. *per week* addition. This was pressed by the Plaintiff's counsel as having been ruled by Lord MANSFIELD, to be evidence of the husband's ability to that extent.

Lord

If a husband has turned his wife out of doors, by a general advertisement in the newspapers, or by particular notice to individuals not to trust her, he cannot exempt himself from a demand for necessaries furnished to her while so living apart from him.

Though a wife has been guilty of adultery, but the husband takes her again into his house, if he afterwards turns her out, he is liable for necessaries furnished to her.

CASES AT NISI PRIUS.

Lord KENYON. The Defendant has urged several matters in bar of this action; but none appear to me to amount to a legal defence. With respect to her having been formerly guilty of adultery, and having been in the *Magdalen Asylum*, though an adulterous elopement will prevent the husband from being liable for articles furnished to the wife during the term of her elopement, that is no answer now. The husband has taken her back; and she was from that time entitled to dower: she was *sponte retracta*, and of course entitled to maintenance during coverture, if her husband turned her out of doors.

The next defence is, That he advertised her in the newspaper, and forbid persons to trust her: that cannot avail him; for if he put her out of doors, though he advertised her, and cautioned all persons not to trust her; or if he even gave particular notice to individuals not to give her credit, still he would be liable for necessities furnished to her; for the law has said, that where a man turns his wife out of doors, he sends with her credit for her reasonable expences.

With respect to the offer of 5 s. *per week*, I agree with what my Lord MANSFIELD has said, That it is evidence to go to the jury of the husband's ability; but the jury ought to consider the terms upon which it was offered.

A juror was afterwards withdrawn by consent.

Erskine and Wainwright for the Plaintiff.

Garrow and Manley for the Defendant.

BATESON v. HARTSINK *et al.*

July 7.

ASSUMPSIT on a bill of exchange accepted by the Defendants, who had been bankers.

The Defendant *Hartsink*, pleaded bankruptcy; and relied on his certificate, which he had obtained.

The Plaintiff proposed to answer this plea, by shewing, That the certificate had been fraudulently and illegally obtained, and was of course void: — 1st, On the ground of concealment of property by the bankrupt, on his last examination; and, 2^{dly}, On the ground, that the bankrupt had gambled in the stocks, and thereby lost a very large sum of money, sufficient to avoid his certificate, under stat. 5 Geo. II. ch. 30.

The solicitor under the commission awarded against the Defendant, was subpœna'd, with a *duces tecum* of the proceedings under the commission.

He was in court, and had the proceedings with him.

The Defendant's counsel objected to the production of them.

It was pressed by the Plaintiff's counsel, That they should be produced; as otherwise it would be impossible to punish any bankrupt who had been guilty of a concealment of his property on his last examination, if the proceedings containing his last examination were withheld: That as the object of the Plaintiff, in calling for the proceedings which contained an account of all the property which the bankrupt gave up, was to shew, that at that time the

The solicitor under a commission of bankruptcy, is not bound to produce the proceedings under it, though called upon by subpœna *duces tecum*.

When the bankrupt pleads his bankruptcy and relies upon his certificate, which the Plaintiff contends is void, under stat. 5 Geo. II. ch. 30, the Plaintiff can only impeach the certificate, but not the commission.

But if the petitioner's creditor signed the certificate, and the debt is bad, it may be impeached, though it may affect the commission itself.

the bankrupt was possessed of other property which he had not there mentioned, or included in any schedule of his property there given in by him; and as the account there given in by him, made part of the proceedings, and was the only legal evidence of what property the bankrupt had there given up, the assignees, by collusion with a fraudulent bankrupt, might screen him at all times: That the statute 5 Geo. II. by making a concealment of property to the amount of 10*l.*, an act sufficient to avoid the certificate, would be nugatory, unless a creditor had a right to call for the proceedings when the case required it.

LORD KENYON said, He was clearly of opinion that the solicitor under the commission, was not only not bound to produce the proceedings, but that it would be criminal in him to do it: they were not his papers, but those of his client's, the assignees of the bankrupt's estate. If the Plaintiff wanted them on the trial of a cause, he should apply to the Lord Chancellor to have them enrolled, and then use a copy as evidence.

Erskine, for the Plaintiff, then proceeded to call a witness to impeach the debt of *Tinson*, who was the petitioning creditor.

This was opposed by the Defendant's counsel, who insisted, That by the words of the statute they were precluded from going into evidence to impeach the commission, and were confined to objections to the certificate only.

Erskine said, That *Tinson* had signed the certificate, and was not a creditor: That he could prove that

that the house of the bankrupt gave *Tinson* the bill without any consideration, for the purpose of making him a petitioning creditor; and that it was, in fact, impeaching the certificate, by shewing that the commission had no legal petitioning creditor's debt to support it.

Lord KENYON, after referring to the statute, said, I think the party is precluded from going into any evidence to impeach the commission; it must be confined to the certificate only: but, if the petitioning creditor signed the certificate, and the debt was of the description mentioned by Mr. *Erskine*, and such as would render the bankrupt's certificate null and void, I shall admit such evidence, though it may have the effect of impeaching the commission itself.

Vid. stat. 24 Geo. II. ch. 57. sec. 9.

The evidence was accordingly admitted: it did not go the length stated by the Plaintiff's counsel; but it was satisfactorily proved by other evidence, That the bankrupt had, previous to his bankruptcy, gambled to a great extent in the public funds, and lost very considerable sums of money on account of differences.

Lord KENYON told the jury, That, if they believed the evidence, the certificate was void under the provision of the statute 5 Geo. II. ch. 30; and that they should find for the Plaintiff.

Verdict for the Plaintiff.

Erskine and *Wigley* for the Plaintiff.

Garrow, *Gibbs*, *Park*, and *Warren*, for the Defendant.

Same day.

HEBDEN v. HARTSINK *et alt.*

ASSUMPSIT by the Plaintiff, for wages as a clerk to the Defendants.

Pleas of *non-assumpsit* and a set-off.

To prove payment of 140*l.* in part discharge of the Plaintiff's demand, the Defendants gave in evidence, That they had given him bills of the house to that amount.

It was contended, for the Plaintiff, That, before this could be deemed a discharge to that amount, the Defendants should prove the bills to have been paid.

Lord KENYON said, It was not necessary. That, where a party took bills in payment of a debt, he would presume the money was received, unless the contrary was shewn.

Erskine and *Wigley* for the Plaintiff.

Garrow, *Gibbs*, *Park*, and *Warren* for the Defendant.

Same day.

PETERS v. BROWN.

ASSUMPSIT for money lent, with the usual money-counts.

Pleas of *non-assumpsit*, the statute of limitation, and a set-off.

To prove an acknowledgment by the Defendant of the debt within six years, the Plaintiff called a witness,

witness, to whom the Defendant was also indebted, and who having called on him for money, the Defendant said, "I suppose you want money; but I can't pay you; I must pay Mr. *Peters* (the Plaintiff) first, and then I'll pay you."

It was objected: That there was no acknowledgment of the debt to the party himself, who had not then demanded it.

But Lord KENYON ruled it to such an acknowledgment as took it out of the statute; and the Plaintiff recovered.

Erskine and *Larves* for the Plaintiff.

Garrow for the Defendant.

VIRANY, Executor, v. WARNE.

ASSUMPSIT for work and labour by the Plaintiff's testator in his lifetime.

The Plaintiff's counsel, in stating the case to the jury, said, That the action was brought to recover a sum of money due to the testator, for acting as an arbitrator on the part of the Defendant, in a dispute which he had had with his partner.

Lord KENYON interrupted him, by saying, That he conceived the action was not maintainable: That the appointment of an arbitrator was not of such a nature as to raise a demand for payment: and that he should tell the jury, that his opinion was, That the Plaintiff was not entitled to
recover

recover any thing, unless she could prove an express promise.

Nonfuit.

Scarlett for the Plaintiff.

July 9.

CHATERS v. BELL *et alt.*

If a foreign bill of exchange is regularly protested and noted, the protest may be drawn up in form at any time afterwards.

THIS was an action of assumpsit, to recover the amount of a bill of exchange for 191 *l.* drawn from *Ireland* by the Plaintiff, as indorsee, against the Defendant, as indorser, who resided in *Liverpool*.

The bill was payable in *London*, at the house of *Thomas Carter*; it became due the 24th of *April*, on which day it was presented at the house of Mr. *Carter*, and refused payment, on the ground of there being no effects: it was then noted, and, on the 25th, returned to the banker's by the notary.

It was regularly returned to *Liverpool*, and the money demanded of the Defendants, who, at first, offered to pay the amount, together with some charges, amounting together to 191 *l.*: this was not then accepted; and being afterwards again demanded, the Defendants refused to pay it, because there was no regular protest.

On the 14th of *May* afterwards, the notary who had noted it, protested the bill in form; and the present action was brought.

The Defence set up was, the want of a protest, which, it was contended by the Defendant's counsel, was necessary and essential to give a title to the holder

holder to demand the money; and which protest ought to be drawn up and dated of the same day with the refusal of payment of the bill. They cited *Gale v. Welsh*, 5. T. Rep. 239.

The Plaintiff's counsel relied on the usage, to note the bill merely for non-acceptance or non-payment, by the notary who presented it; and that he could draw up the protest in form at any subsequent time; and cited *Bull. N. P.* 271.

LORD KENYON said, He was of opinion, that, if the bill was regularly presented and noted at the time, that the protest might be made at any future period. It was certainly necessary to have the protest, for the purpose of litigation; as in declaring on the bill, if it was a foreign one, the case cited had decided, That the protest must be stated and proved; but that case went no further, and was silent as to the time when the protest should necessarily be made; but though not made at the time of the refusal, if regular notice of non-payment had been given, he thought the want of an actual protest afforded no justifiable ground in law to the indorser to refuse payment of the bill.

On the application of the Defendants counsel, the point was reserved:—Verdict for the Plaintiff, subject to the opinion of the court.

Erskine and *Courthope* for the Plaintiff.

The *Attorney General* and *Gibbs* for the Defendant.

The case came on afterwards to be argued; but a *venire facias de novo* was awarded, and the cause came on again to be tried before LORD ELLENBOROUGH; who expressed himself to be of the same opinion with that delivered in this case by LORD KENYON.

July 12.

Doe ex dem. STEPHENSON v. WALKER.

When witnesses to a will are dead, and it is impeached on the ground of fraud in the procuring of it, and that fraud is imputed to the witnesses, evidence may be called to their character.

THIS was an ejectment brought to recover the possession of lands and premises in *London*.

It had been before tried (*ante* vol. 3. p. 284.) when the present Defendant recovered as heir at law.

The lessor of the Plaintiff claimed as the devisee under the will of *Mary Robinson*, who had died seized of the estate in question.

The validity of the will, which was regularly executed in point of form, was impeached, on the ground of total incapacity in the testatrix to make any will at the time the present will was supposed to have been made.

The names of three witnesses were regularly subscribed, as attesting its execution. These witnesses were a Mr. *Gale*, an attorney, by whom it was prepared; one *Reynolds*, his clerk; and one *Cooper*. The two former witnesses were dead; and *Cooper* was called to impeach the validity of the will, which he had attested; having done so successfully at the former trial.

The testatrix died at *Rumford*, in *Essex*, where she had resided for some years; and the will was dated in the year 1786.

The evidence of *Cooper* was, That, on the day the will bore date, he was brought in a chaise to *Rumford* by *Stephenson*, the devisee, in company with *Gale* and *Reynolds*, the two other witnesses to the will: That about 11 o'clock at night (he having been there many hours before) he was called into the testatrix's room, where *Gale* and *Reynolds* then were,

were, and had been there for some length of time before: That the will lay on the table, signed by *Gale* and *Reynolds*, but they had not signed it in his presence: That the pen was put into the testatrix's hand, for the purpose of signing her name to the will: That she seemed to be in a state of stupid insensibility, and unable to write: That her hand was guided, and her name so subscribed, without her seeming to know what she did.

The credit of this witness being much shaken by the cross-examination of *Garrow*, of counsel for the Plaintiff, it was then proposed to call witnesses to the characters of *Gale* and *Reynolds*, they being dead, and the whole of the question turning upon the credit which was due to their attestation.

This was opposed by *Gibbs*, for the Defendant, who relied on the case of *Doe* on the demise of *Farr v. Hicks*, tried at *Winchester*, before Mr. Justice BULLER; in which case an attorney had been charged with having imposed a fictitious will on a testator *in extremis*; and in which case, he stated, That it was proposed to call witnesses to the character of the attorney; but the evidence was rejected by that Judge, who took this distinction, That, where a particular fraud was imputed to a party, general evidence to character was inadmissible; but that it was otherwise, where general character was put in issue.

LORD KENYON said, That he was of opinion, the evidence was admissible. The general rule was as laid down by the Defendant's counsel; but there might be exceptions to it. In the great case of

Jolliffe's will, Lord *Dudley* and *Ward*, and other persons, were examined as to the character of the person by whom the will was prepared ; and the legality of admitting such evidence was not doubted.

The evidence was therefore received.

Several witnesses, particularly of the profession of the law, were called, and asked as to the general character of *Gale* and *Reynolds*, and whether they were persons of good reputation; and likely to be guilty of such conduct as was imputed to them. The witnesses all concurring in saying, That they were esteemed to be men of probity and respectability, and not likely to be engaged in a transaction so iniquitous as was supposed,—

The jury found a verdict for the Plaintiff, in favour of the validity of the will.

Erskine, *Garrow*, and *Warren*, for the Plaintiff.

The *Attorney General*, *Gibbs*, and *Jervis*, for the Defendant.

After the recovery in this action, a third ejectment was brought by the heir at law, in the court of Common Pleas ; by the verdict in which the will was again established.

SAVILL v. BARCHARD *et alt.*

July 13.

THIS was an action of trover for a quantity of baize.

The Plaintiff was a manufacturer, and had sent up the goods in question to Messrs. *Green* and *Walford*, his factors, in the month of *December* 1796.

At that time there was a war with *Spain*; but it was expected that peace would shortly take place, when there would be an opportunity of exporting them.

Green and *Walford* spoke to *Lucas* and *Bentley*, who dealt in commodities for the *Spanish* market, telling them, that they had the goods in question; which, when dyed, would suit that market; and wishing *Lucas* and *Bentley* to take them.

Lucas and *Bentley* agreed to take them; but no price was then fixed, as that was to be determined by the event of a peace.

The defendants were dyers, and were applied to by *Lucas* and *Bentley* to dye the baize. It was agreed that they should send for them for the purpose of dying, and so preparing them for the market, on the event of a peace taking place. The Defendants accordingly sent for the baize; and they were delivered to them; and the names of *Lucas* and *Bentley* put on them by the Defendants.

Lucas and *Bentley* having become insolvent while the goods remained in the hands of the Defendants, the Plaintiff demanded them as his property: the Defendants refused to deliver them, claiming a lien

Dyers have a lien on goods sent to them to dye, for the balance of a general account.

on them for the balance of a general account due by *Lucas* and *Bentley* to them.

It appeared that the Defendants did not know that the goods were the property of the Plaintiff: on the contrary, Mr. *Bentley* swore, That he believed the Defendants conceived them to be absolutely the property of himself and his partner, and that a sale of them had taken place, though the price had not been fixed, nor a bill of parcels delivered.

The Plaintiff's counsel relied on the case of *Green v. Farmer*, 4 Burr. 2214; in which it had been expressly decided, That, though dyers might have a particular lien for work done on any specific parcel of goods delivered them to dye, they had none for the balance of a general account.

The Defendants counsel called several witnesses, to prove that the lien claimed by the Defendants was considered in the trade as unquestioned, and was sanctioned by constant use and practice.

It was said to be the case of *Stainton*, assignee of *Fernandez v. Davies*, but the term in which it was tried was not stated.

One witness swore, That, having retained a quantity of goods belonging to an insolvent estate under a similar claim of lien, the assignees had brought an action against him, in which he had succeeded.

Other witnesses swore, That they always understood it to be the practice of the trade; but not being able to prove any particular instances in which it had been asserted, Lord KENYON said, That their evidence went for nothing. One witness, who had been in the trade for thirty years, swore positively, That he had, in many instances, claimed the
lien.

lien, and in some very recent ones against insolvent estates; and that such claims had been acquiesced in.

LORD KENYON said, That the courts of law and the understandings of people in general, had gone much in favour of liens: That it was established in the case of bankers, packers, and wharfingers, that they were entitled to such lien. That in the case of *Green v. Farmer*, LORD MANSFIELD held, That liens arose either from the express agreement of the parties,—from the particular mode of dealing between the parties,—or from the general course and practice of the trade; but in that case, there was no evidence of a lien on any of those grounds; and it was therefore properly held, that there was no lien founded on any such custom: but in the present case, there was strong evidence to prove the general course and practice of the trade, and to establish a lien founded on them. It was a question of great general importance. He was of LORD MANSFIELD's opinion in the case of *Green v. Farmer*, that a lien was established by the general course and practice of the particular trade; and if the jury thought that such was the general course and practice of the trade, they should find for the Defendants.

The jury found a verdict for the Defendants; thereby establishing the principle, That dyers have a lien for the balance of a general account.

Garrow, Park, and — for the Plaintiff.

The *Attorney General* and *Gibbs* for the Defendants,

July 16.

SIR JOHN LAWSON and others v,
WESTON and others.

If a bill has been lost, and the loser has advertised it in the newspaper, and it is discounted for the person who found it, and so came fraudulently by it, this entitles the person discounting it to recover the amount, if done *bona fide* and without notice of the way by which the holder became possessed of it.

THIS was an action brought to recover the amount of a country bill of exchange for 500*l.*, drawn by one *Vazie*, in favour of *Stokoe*, at fifty days, on the Defendants, who were the partners of the *Southwark* bank, and accepted by them.

The Plaintiffs were the members of the *Richmond* bank, in *Yorkshire*; where they resided. They had discounted the bill in the usual course of their business, at *Richmond*, for a person who brought it to their shop, but who was unknown to them; but the bill had been drawn in their neighbourhood, at *Newcastle*, and they were perfectly acquainted with all the hands-writing of the several parties to it.

The bill had been regularly indorsed by *Stokoe*, to a person of the name of *Shears*, who had also put his name on it. *Shears* lost it, or it was stolen from him; but it was proved, that he had advertised it immediately on its being lost.

The names of *Stokoe* and *Shears* were on the back of the bill; and on its being discounted, the person who discounted, was desired to put his name on it; he put the name of *John Warren* on it; and no further inquiry was made by the Plaintiffs, who paid him the amount, deducting the discount.

The Defendants were indemnified by *Shears*.

The *Attorney General* stated the grounds upon which the payment of the bill was resisted. That he was in possession of evidence to shew that

that the bill was the property of *Shears*, by whom it had been lost: That *Shears* had advertised it, and so given notice to have it stopped in payment: That though a person might pay a bill to which he was a party, to one who had come dishonestly by it, by reason of the personal liability attached to his name on the bill,—a banker, or any other, should not *discount* a bill for a person unknown, without using diligence to inquire into the circumstances, as well respecting the bill as of the person who offered to discount it: That it was the usual course of the banking trade, which he was prepared with evidence to shew, that where a bill of the amount of the present was offered for discount, never to do it, without making such inquiries; and that he would call several bankers to prove to that effect.

LORD KENYON. I think the point in this case has been settled by the case of *Miller v. Race*, in *Burrow*. If there was any fraud in the transaction, or if a *bona fide* consideration had not been paid for the bill by the Plaintiffs, to be sure they could not recover; but to adopt the principle of the defence to the full extent stated, would be at once to paralyze the circulation of all the paper in the country, and with it all its commerce. The circumstance of the bill having been lost, might have been material, if they could bring knowledge of that fact home to the Plaintiffs. The Plaintiffs might or might not have seen the advertisement; and it would be going great length to say, that a banker was bound to make inquiry concerning

concerning every bill brought to him to discount : it would apply as well to a bill for 10*l.* as for 10,000*l.*

With respect to the evidence offered of the usage of other banking-houses, I cannot admit it : it depends on their mode of doing their business, or on their funds. This could not affect others who acted on different principles, but with equal integrity. That which had been called the usage of trade, depended on the different degree of confidence which different men possessed, and not on any settled or regular rules.

The magnitude of the bill has been pressed as a ground of suspicion by the Defendants counsel : I do not feel it of such importance. A person going to the country, and having occasion to bring a sum of money, might prefer bringing it in that way rather than in money. I therefore see no misconduct imputable to the Plaintiffs ; but I think they are bound, under the circumstances of the case, to prove the value actually paid for it.

The Plaintiffs proved the consideration paid for it, and had a verdict.

Garrow, Gibbs, and 'Espinasse for the Plaintiffs.

The *Attorney General, Erskine, Park, and Holroyd* for the Defendants.

C A S E S

ARGUED AND RULED

AT NISI PRIUS,

ON THE

HOME CIRCUIT.

MAIDSTONE SUMMER ASSIZES, 1801.
CORAM LORD KENYON.

ELLIOTT, Executor of THOMPSON,
v. ROGERS.

ASSUMPSIT for use and occupation of certain premises belonging to the testator.

The Plaintiff proved, that the premises belonged to his testator; and the occupation by the Defendant.

The Defendant's counsel objected to the form of the action, and contended, That the Plaintiff should be nonsuited, as the testator had demised the premises by deed; which they produced.

It was read, and began, "Articles of agreement between — *Thompson* (the testator) and — *Rogers* (the Defendant);" by which *Thompson* agreed to let, and to make a lease to the Defendant: and it was there further agreed, that the expences should be borne between them.

If there is an agreement by deed to demise an house, by words not amounting to an actual demise, the party may maintain an action for use and occupation.

Per

CASES AT NISI PRIUS,

Per Lord KENYON. If there was a demise by deed, the Plaintiff could certainly not maintain an action in the present form ; but this is not a lease of the premises, it is only an agreement for a lease. The Defendant does not hold under the deed ; and the action is therefore maintainable.

Verdict for the Plaintiff.

Best, Serjt. and *Marryat* for the Plaintiff.

Garrow and *Lawes* for the Defendant.

HARTSHORN *et alt.* Assignees of
WRIGHT, a Bankrupt, v. SLODDEN.

If a creditor obtains goods from a trader on the eve of his bankruptcy by pressing him for payment, and it does not appear to be voluntarily done, in order to give a fraudulent preference, the creditor may hold those goods, though the money due on the security for his debt was not due at the time.

THIS was an action of trover, for a quantity of earthen-ware and glass, the property of the bankrupt, and claimed by his assignees, on the ground of the Defendant having become possessed of it by an undue preference.

The case was, That the bankrupt carried on the business of an earthen-ware and glass-shop, in *Canterbury*. He was indebted to the Defendant in a sum of 100 *l.* ; and for that, she had taken a bond payable in *March*, 1801.

On the 29th of *November*, 1800, suspecting the credit of the bankrupt, and that he was likely to fail, she prevailed on him to give her to the amount of 90 *l.* in glass and earthen-ware, to cover part of her debt ; but it was not in the way of her business to sell such articles, but for the purpose of covering her debt.

On

On the 6th of *December* following, the bankrupt was arrested; and, while in custody, executed a bill of sale of all his effects, to a creditor; and thereby committed an act of bankruptcy. He was liberated on executing a warrant of attorney, and then absconded; and soon after was declared a bankrupt.

The counsel for the Plaintiff contended, That, from the circumstances of the bankrupt being arrested so soon after he had delivered the goods to the Defendant, and his then absconding, there was sufficient evidence to shew, that, when he delivered the goods to the Defendant, he knew he could not stand; and, of course, that this was fraudulent, as he must have known that a bankruptcy was inevitable, and that the creditors would be defrauded; but that the money, being not then due, put it out of doubt.

LORD KENYON said, He had considerable doubts on the case; there was no evidence of fraud, or of voluntary fraudulent preference. He had once been of opinion, that this would be deemed fraudulent; but that he found himself pressed by the case of Mr. Payne the bookseller (6. *Term Reports*, 152.) in which the transaction was similar to this, in which the Court of King's Bench held, That a creditor might secure himself, as the Defendant had done here: that here, there was no evidence of any act of bankruptcy committed, or in contemplation; if, therefore, the case stood clear of the circumstance of the debt not being due when the goods were delivered to the Defendant, he much doubted whether he should not be bound to direct the Jury to find for the Defendant; but that circumstance formed a new feature in the case;
that,

that, he thought, distinguished it from the decided case ; and he should direct the jury to find for the Plaintiff ; but the Defendant should have liberty to move to set it aside without costs.

Verdict for the Plaintiff.

Garrow, Best, and 'Espinasse, for the Plaintiff.

Shepherd and Harvey for the Defendant.

In the next term the Court of Common Pleas was moved for a rule to shew cause, Why the verdict should not be set aside and a nonsuit entered ? which rule was afterwards made absolute.

Vid. 2 Bos. & Pull. 582.

C A S E S

ARGUED AND RULED

AT NISI PRIUS,

IN THE

KING'S BENCH,

MICHAELMAS TERM, 42 GEORGE III.

 SITTINGS AFTER TERM.

GEORGE v. PERRING & *alt.* Sheriff *November 30.*
 of Middlesex.

THIS was an action of debt, on stat. 32 Geo. II. ch. 28. brought to recover the penalty given, for taking above the sum allowed by the statute from the Plaintiff, on the taking a bail-bond.

The case stated on the part of the Plaintiff was, That a bailable writ having issued against the Plaintiff, at the suit of one *Savill*, marked for bail for 12 *l.* 10 *s.*, he was arrested under it, and carried to the house of one *Evans*, who kept a lock-up house: *Evans* was a sheriff's officer, but not the

Where more than the sum allowed by statute has been taken for a bail-bond, by an officer of the sheriff who keeps a lock-up house, but who was not the officer to whom the warrant was directed, but to whose house the Defendant was brought after being arrested, no action will lie against the officer.

officer.

officer who made the arrest; nor was the warrant directed to him, but to another officer: while the Plaintiff was in custody at *Evans's*, he entered into the bail-bond in question; and paid *Evans* for it 2 *l.* 12 *s.* 6 *d.*

The Plaintiff proved the issuing of the writ; and was preparing to call the sheriff's officer who made the arrest, to prove the circumstances that took place at *Evans's* house, and the payment of the money to him for the bail-bond.

It was objected that the warrant of the Defendants to the officer should be produced.

It was answered and contended by the Plaintiff's counsel, That he having been brought to *Evans's* house after having been arrested, the warrant was delivered to him, and kept by him after the bail-bond was entered into.

LORD KENYON. The Plaintiff can proceed no further without the production of the warrant; but I am of opinion; That the action is not maintainable under the circumstances of the case.

This is an action against the sheriff for the misconduct of his officer, who, under colour of his office, has extorted from the Plaintiff a sum of money, for the charges of a bail-bond, beyond the sum allowed by law. It might be sufficient to say, that the sheriff must be connected with the acts of his bailiff, who must appear to have been acting under his authority at the time of committing the illegal act; and that has not been done here, for the warrant which gave the authority has not been produced: but there is more in this case; the sheriff must

must be made criminal by the act of his officers, not as officers generally, but as such in the particular case in question; it must appear that he had entrusted them with his authority in the particular case in which they had abused it; and the delegation of that authority must appear by his having in that case directed his warrant to them. In this case, the extortion was committed by *Evans*; but he was not the officer to whom the warrant was directed; the house of *Evans* was not the sheriff's gaol; nor was the Plaintiff, while there, in the sheriff's custody. Though *Evans* may be answerable for his own extortion in another action, he cannot, by his act, make the sheriff criminal in a case in which he was neither entrusted nor concerned.

The Plaintiff was nonsuited.

Erskine and *Manley* for the Plaintiff.

Garrow and *'Espinasse* for the Defendant.

DAWSON, Gent. v. Sir ROBERT LAWLEY, Bart.

ASSUMPSIT by the Plaintiff, who was an attorney, to recover the amount of his bill, for business done in preparing a release.

The Defendant having been engaged in an arbitration, the arbitrator had awarded, that he should pay a sum of 5*l.*, and that he and the other party should be jointly and severally bound to carry the whole award, as far as respects his client, into effect, though his immediate business was to do but part of it.

If an attorney is employed by a person to act for him, after an award has been made against him, and he is desired to do what is needful, he shall be thereby warranted to do his immediate

to the arbitration should execute to each other mutual releases.

The Plaintiff was not the regular attorney for the Defendant, but had been employed by him to pay the 5 *l.*; and, on being so employed, he said, That he would take care that Sir *Robert Lawley* should have no more trouble about the business; upon which he was told by the Defendant to do the needful.

Afterwards, discovering that, beside the payment of the 5 *l.*, the parties were to execute mutual releases, he had prepared a release, pursuant to the award; for which the Defendant refused to pay.

It was contended by his counsel, That this was a special retainer for one purpose only, the payment of the 5 *l.* under the award: That the Plaintiff, not being the regular attorney of the Defendant, an express order ought to be proved to do the business in question, or he could not recover.

Lord KENYON said, That that, as a general position, might be true; but that the Defendant, having given orders to the Plaintiff to do what was needful, thereby authorized him to take such steps as were directed by the award to which the payment of the 5 *l.* immediately had relation; and that the executing of mutual releases being also part of the award, it came within the scope of his authority, and that the Plaintiff was entitled to recover.

Verdict for the Plaintiff.

Garrow and *Marryat* for the Plaintiff.

Mingay for the Defendant.

DICK-

DICKINSON v. SHEE.

December 4.

ASSUMPSIT for servant's wages.

Plea of non-assumpsit as to all except 5*l.* 5*s.*, and as to that sum a tender.

To prove the Plaintiff's case, his counsel called a servant who had lived in the Defendant's family. She was examined, cross-examined, and proved the Plaintiff's service, so as to entitle him to recover.

When the Plaintiff had finished his case, the Defendant's counsel was proceeding to prove the tender. A witness was called, who failed in doing it; so that it became necessary to call back the servant who had been first called by the Plaintiff, to prove the tender.

Garrow, for the Defendant, was proceeding to put this question as a leading one, "Did you not see your master tender the Plaintiff the sum of 5*l.* 5*s.* on account of his wages?"

Mingay, for the Plaintiff, objected to this mode of examining the witness, contending, that the witness having been examined, cross-examined, and quitted,—by being brought back to be examined, to prove the Defendant's plea, she should be examined as a witness called in chief to prove the issue; and that the question should not be put in that leading shape.

Lord KENYON ruled, That the witness having been originally called by the Plaintiff, and examined as his witness, the privilege of the Defendant to

If a witness called by the Plaintiff has been examined, cross-examined, and quitted, and the Defendant has afterwards occasion to call the same witness back to prove his case, the counsel for the Defendant is not bound to examine as in chief, but may put leading questions, as in cross-examination.

cross-examine, remained in every stage of the cause, and for every purpose; and that the question was therefore properly put by the Defendant's counsel.

Under a plea of tender, where the Plaintiff disputed the quantum, to prove a tender some money must be produced, though it is not necessary to prove the exact sum.

To prove the tender, the Defendant gave in evidence, That he and a friend had gone to the chambers of the attorney for the Plaintiff, and said, that he was come to settle with him the account of the Plaintiff: That he produced a paper, containing a statement of the account, in which he made the balance 5*l.* 5*s.*; which he said he was ready to pay; but he produced no money nor notes: The Plaintiff's attorney said, He could not take that sum, as his client's demand was above 8*l.*

Garrow, for the Defendant, contended, That this was a sufficient tender, by the Plaintiff's attorney having objected to the quantum of the sum demanded; relying upon the rule, that if, at the trial, the sum which the Defendant had proposed to give was found to be the right one, it dispensed with the necessity of an actual production of the money.

LORD KENYON said, That, when there was a dispute as to the amount of the demand, the Plaintiff, by objecting to the quantum, might dispense with the tender of the actual, or of any specific sum; there should, however, be an offer to pay, by producing the money, unless the Plaintiff dispensed with the tender expressly, by saying, that the Defendant need not produce the money, as he would not accept it; for, though the Plaintiff might refuse the money at first, if he saw it produced, he might be induced to accept of it.

Verdict

Verdict for the Plaintiff.

Mingay and Humphreys for the Plaintiff.

Garrow for the Defendant.

Vid. Douglas v. Patrick, 3 Term Rep. 684. *Black v. Smith, Peake*, N. P. Cas. 88.; which latter case seems rather *contra*.

COTTERELL v. GRIFFITHS.

THIS was an action on the case, against the Defendant, for obstructing the Plaintiff's lights.

Plea of Not guilty.

The Plaintiff proved, That he was possessed of an ancient house, the windows of which looked into the Defendant's garden : That the Defendant had erected a large paling, which had completely darkened them ; and there rested his case.

The defence relied upon by the Defendant's counsel was, That the windows had never been completely open, but had had blinds fastened to the window-frames, which prevented the Plaintiff from seeing into the Defendant's garden, the blinds sloping upwards, and only serving for the admission of light : That the Plaintiff had thrown down those blinds, and thereby opened a full and uninterrupted view over the Defendant's premises, and thereby deprived him of the privacy and retirement of his garden : That the Plaintiff having only a qualified

Where the Plaintiff is entitled to light by means of blinds fronting a garden of the Defendant's which he takes away, and opens an uninterrupted view into the garden, the Defendant cannot justify making an erection to prevent the Plaintiff so doing, if he thereby renders the Plaintiff's house more dark than before.

right of enjoyment by means of the blinds, could not alter it to an uninterrupted view over the Defendant's garden, to prejudice him in the enjoyment of it ; and that it was therefore lawful in him to prevent the Plaintiff from that mode of enjoyment, to which he was not entitled.

LORD KENYON asked, if the paling erected by the Defendant, in the front of the window, had rendered the rooms more dark than they were when the blinds only were up ?

Being answered, that it did, his Lordship said, That the Plaintiff was clearly entitled to recover : That, to sustain this action, a total privation of the light was not necessary ; any thing which tended to deprive a person of the enjoyment of the light and air, in the same quantity to which his house was entitled as an ancient messuage, entitled him to an action : That here it was admitted, that, since the erection of the nuisance complained of, he had not the same quantity of light as before while the blinds remained, and that that was such a privation as entitled him to recover in the action.

It was urged for the Defendant, That one of the windows affected by the erection, was not an ancient one, but broke out by the Plaintiff in the wall which joined the Defendant's garden ; but, upon examination, it was said, by a witness, to have been broken open thirty years ago.

LORD KENYON said, That was sufficient : That, though a person could not break out windows, and give them then the privilege of ancient lights, in the case of *Updell v. Wilson*, before Lord Chief Just.

Just. WILMOT, he had held, that if the windows were open twenty years, or, perhaps, less, that gave the owner of the house such a right, that they could not be obstructed; and that had been since considered as the law on the subject.

Verdict for the Plaintiff.

Garrow and *Harrison* for the Plaintiff.

Gibbs and *Reader* for the Defendant.

Vid. the case of *Lewis v. Price*, *Worcester Summer Assizes*, 1761, Coram WILMOT, Chief Justice. Esplan. Dig. N. P. 636.

WILSON v. PAGE.

December 21.

THIS was an action of trespass, for cutting turf, and digging sand, loam, and gravel, on Hampstead Heath.

The Defendant justified under a custom for the tenants of a particular copyhold tenement parcel of the manor stated in the plea, to cut turf and dig sand, loam, and gravel, to be used and spent on the tenement.

Issue was joined on the custom stated in the plea.

The Plaintiff proved the trespass committed by the Defendant, and then closed his case.

The Defendant then offered to call witnesses, to prove a general usage for all the copyholders of the manor at large, to cut turf, dig gravel, loam, &c.

Where, in trespass for digging gravel, &c. on the waste, the Defendant justifies under a usage for the tenant of a particular copyhold tenement to dig gravel, &c. he shall not be allowed to give evidence of a general usage to that effect in all the copyholders.

but without being able to prove the particular usage as to the tenement stated in the plea.

Gibbs, for the Plaintiff, objected to this general evidence, and contended, That the Defendant should be confined in his evidence to the proof of the particular usage stated in the plea; and should not be permitted to go into evidence applying to all the copyholders of the manor at large.

It was answered by the defendant's counsel, that evidence of a general usage going over the whole manor, necessarily included that of a particular tenement parcel of the manor; and was therefore admissible.

Lord KENYON ruled, That such general evidence was inadmissible: That the Defendant, having pleaded a custom confined to a particular tenement, should be bound by his plea, and confined to evidence of it only. His Lordship rejected the evidence; and there was a verdict for the Plaintiff.

Gibbs and *Wood* for the Plaintiff.

Erskine, *Garrow*, and *Lawes*, for the Defendant.

December 3.

ROLFE v. NORDEN.

When a tender has been made in the term, prior in fact to the commencement of the action, but the declaration is of the same term as that refers to the first day of the term, the Defendant shall not be allowed to prove the tender in evidence, as there should have been a special memorandum of the day.

ASSUMPSIT for use and occupation, goods sold and delivered, with the common money-counts. Plea to the whole declaration non-assumpsit, except as to 5 *l.*; and as to that a tender.

The

The action was brought in *Easter* term, which began on the 22d of *April*.

The Plaintiff having proved his case, the Defendant called a witness to prove the tender of the 5 *l.* pleaded.

This witness proved, that he was in company with the Plaintiff and the Defendant, on the 25th of *April*, on which day the Defendant tendered 5 *l.* to the Plaintiff.

It was then contended by the Plaintiff's counsel, That the evidence was inadmissible as an answer to the Plaintiff's action; for that the declaration being entitled generally of *Easter* term, it had relation to the first day of term, the 22d, and, of course, the tender being on the 25th, was subsequent to the commencement of the action.

It was answered by the Defendant's counsel, That the party should not be concluded by fiction of law, which was introduced for the furtherance of justice; and that he should be at liberty to shew the true time when the writ was sued out, and that, in truth, the tender preceded it: That this had been so settled in a case in *Burrow*, of *Morris v. Pugh*, [3 *Burr.* 1243.]

* LE BLANC, Justice, said, That he was of opinion, the Defendant was bound by the relation of the Declaration to the first day of the term, unless there was a special memorandum of the day when it was filed or delivered: That if, in fact, the writ was

* Lord Kenyon was absent, from illness, almost the whole of the sittings after this term.

sued

sued out in term, and the tender was made in term, but prior to the commencement of the action, the Defendant ought to have taken out a summons, and compelled the Plaintiff to have entitled his declaration according to the truth; and then the Defendant's plea would apply to the time appearing on the face of the declaration.

Erskine, contra, strongly contended, That he had right, without taking such steps, by producing the writ itself, to shew the true time when it was sued out.

LE BLANC, Justice, said, He should admit it; but with liberty to the Plaintiff to move to set the verdict aside, in case the Defendant proved the tender and had a verdict.

The Defendant, however, not being able to produce the writ, the Plaintiff had a verdict.

Gibbs and Marryat for the Plaintiff.

Erskine and 'Esprinasse for the Defendant.

SITTINGS AFTER TERM AT GUILDHALL.

IN THE KING'S BENCH.

SAINTHILL v. BOUND.

December 14.

A witness cannot be cross-examined as to what he swore in an affidavit, unless the affidavit is produced.

THIS was an action brought to try Whether certain goods taken in execution, under a judgment, confessed by one *Lee*, were the property of *Lee* or of the Plaintiff?

A wit-

A witness was called and examined on the part of the Plaintiff. *Gibbs*, of counsel for the Defendant, was proceeding to cross-examine him as to what he had formerly sworn in an affidavit.

Lord KENYON interposed, and asked, If the Defendant had the affidavit in court, or an office-copy? as it was necessary to have the affidavit to read, before the witness could be examined as to its contents.

The affidavit not being in court, the witness was not cross-examined to it; and the Plaintiff had a verdict.

Erskine and ——— for the Plaintiff.

The *Attorney General* and *Gibbs* for the Defendant.

HULLE v. HEIGHTMAN.

THIS was a special action on the case.

The declaration stated, That the Plaintiff being a sailor, and the Defendant the master of a certain *Danish* ship called the *Neptunus*, That the Plaintiff hired himself as a sailor on board the said ship, on a voyage from *Altona* to *London*, and back again to *Denmark*: That it was further agreed between the Plaintiff and the Defendant, that in case the Defendant should not permit the Plaintiff to return to *Denmark* in the said ship, he would pay him two months wages. The declaration then averred, that he had requested him to permit him to return to *Denmark*, or to pay him the two months wages; but

When the subjects of a foreign country enter into an agreement conformable to the laws of their own country, they cannot, by a subsequent agreement, contravene such laws; and an agreement to such effect cannot be enforced.

but that the Defendant had dismissed him at *London*, and had not paid him the two months wages, or any wages for the voyage from *Altona* to *London*.

There were the common counts for work and labour, &c.

The Plaintiff and Defendant were subjects of *Denmark*, and the ship *Danish* property.

The ship's articles, which were settled by the laws of that country, were given in evidence; they were printed, and proved to be the established form of such contracts.

By those articles, the captain is bound to bring back his crew to *Denmark*, under penalty of life and limb. By another article, it was further provided, That no sailor should demand any money from the captain while abroad; but that every one should content himself with the money received upon hand until the completion of the voyage, to the satisfaction of the captain and his owners; and until such time as the ship and cargo shall be safely landed at *Altona*: and it was to be at all times in the option of the captain to give money to the sailors, or not, when abroad; nor should it be lawful for any of them to demand a discharge while abroad; but each was to be held to complete his voyage, being bound to that effect by subscribing the articles.

There was no clause whatever in the articles by which two months wages were to be paid in case any of the sailors were dismissed in a foreign country, as the Plaintiff had declared. This being made as an objection by the Defendant's counsel to the Plaintiff's recovering to that amount,

Gibbs

Gibbs stated, That he proposed to give in evidence a collateral agreement, by which the Defendant promised the Plaintiff, and the other sailors, to give them two months wages, in case he discharged them at a foreign port before they returned home.

This was objected to, as varying the written terms of contract, under which the Plaintiff had agreed to sail.

LE BLANC, Justice, said, That the Plaintiff could not go into any such evidence, as it contravened the laws of the country under which the contract was made; the Defendant having bound himself, by the laws of that country, under a penalty to bring back the crew which sailed with him. He therefore rejected the evidence.

Gibbs, for the Plaintiff, then proposed to go into evidence on the general counts, for work and labour for the part of the voyage performed, from *Altona to London*.

This was opposed by the Defendant's counsel, on the grounds that, under the articles, the sailors were prevented from making any demand for wages until their return to their own country, and the voyage was completed.

It was urged in reply to that, That the evidence went to prove that the captain had, by his own act, put an end to the contract, by compelling the men to leave the ship: That he should not therefore be allowed to avail himself of the articles which, by his own act, he had broken; nor seek to protect himself by a clause in those articles which he himself had rescinded.

When sailors have sailed under written articles, by which they are bound to serve to the end of the voyage, if the master, by ill treatment, compels them to leave the ship, they should declare specially for the injury, and cannot go for work and labour.

LE

WHITE v. TAYLOR and SIMCOE.

THIS was an action of trespass and false imprisonment.

The Defendant *Taylor*, was a constable.

The circumstances of the case were these :— The Plaintiff had hired a coach, which was driven by the Defendant *Simcoe*. Being dissatisfied with his conduct and insolence, he had got out of the coach, and, intending to punish him, wished to take his number; which he had taken hold of for that purpose. The Defendant *Simcoe*, observing his purpose, violently drove away, leaving the number in the Plaintiff's hand.

The Plaintiff having gone to the watch-house to prefer his complaint, the coachman was sent for, when he charged the Plaintiff with having stolen his number. *Taylor* presided in the watch-house as the constable; and on this complaint being made, committed the Plaintiff to the *Counter*.

The counsel for *Taylor* relied on the case of *Samuel v. Payne*, *Dougl.* and contended, That the charge having been regularly made before him, he was justified in committing the Plaintiff.

Erskine, for the Plaintiff, admitted, That if a constable *bona fide* receives a charge, and commits the party charged, however unfounded the charge might be, no action was maintainable against him: but he contended, That where he acted without a charge, without taking proper care, or using a proper

per degree of discretion ; and where it appeared that the charge was totally unfounded, that it was a matter to be left to the jury, whether the committal was *bona fide*, or an improper exercise of the authority with which he was invested ; and which he contended had been the case here.

LE BLANC, Justice. I think it is a matter of law, and not to be left to the jury. If no charge was given, or a collusive one, whereby the constable has made himself a party in oppressing and committing the Plaintiff to prison, he will be liable to an action ; but that is matter of evidence. He may, if he pleases, use his own discretion, and exercise his own judgment, on a charge made before him ; but if the Plaintiff cannot make out such a case as amounts to collusion, or that makes the constable a party to the wrong ; if a regular charge is made before him, he is warranted by law in committing the party charged : that was the case here, and in my opinion entitles the constable to a verdict. As to the hackney-coachman, he having made the charge knowingly and without foundation, in consequence of which the Plaintiff has been imprisoned, is guilty of a trespass ; and the Plaintiff is entitled to a verdict against him.

Verdict for the Plaintiff against *Sincoe*, and for the Defendant *Taylor*.

Erskine and ——— for the Plaintiff.

Gibbs, Park, and Gurney for the Defendant.

October 27.

WRIGHT v. LAWES.

To deprive the vendor of goods of the right to stop in transitu, it is not necessary that they should be delivered at the consignee's place of abode; it is sufficient if they have come into his possession, and that he has exercised some act of ownership in them.

THIS was a special action on the case.

The Plaintiff, by his declaration, complained, That four pipes of *Port-wine* had been sent to him from *London* to *Yarmouth*, where they had been received by his agent, and delivered to the Defendant, to be kept and warehoused for him for a certain reward to be paid by him to the Defendant, and to be afterwards delivered to him; and then assigned a breach in the non-delivery.

There was a count in trover, and a general plea of Not Guilty to the whole declaration.

The case was, That the Plaintiff, who was a manufacturer at *Norwich*, had, in the *June* preceding, entered into an agreement with one *Shevill*, for the purchase of four pipes of *Port-wine*; one of which was to be paid for in money, to the amount of 75 *l.*; and for the remainder, *Shevill* was to take goods in which the Plaintiff dealt.

Shevill wrote up to his correspondent in *London*, a person of the name of *Farquharson*, to send the wine. He purchased it from *Bamford, Bruin, and Co.*; and had the four pipes shipped; and, by the bill of lading, consigned them to the Plaintiff by a vessel employed in the course of trade between *Yarmouth* and *London*.

When the wines arrived at *Yarmouth*, one *Boardman*, as the agent for the Plaintiff, received the
wines

wines on his account; but his own cellars not being large enough to hold them, he applied to the Defendant; who took them into his cellars, and was to be paid for the warehouse-room by the Plaintiff.

Two days after, the Plaintiff came over to *Yarmouth* from *Norwich*, where he lived; went to the Defendant's cellars where the wines were deposited, tasted, and took samples of them.

While the wines remained in the Defendant's possession, *Bamford, Bruin, and Co.* discovering that *Farquharson*, to whom they had sold the wines, was a swindler, and a man of no property; they stopped the goods in the Defendant's possession, by giving him an indemnity; and the present action was brought for the recovery of them.

The Defendant's counsel stated their defence to be, first, That the Plaintiff was concerned in the purchase of the wines by collusion with *Shevill and Farquharson*; which being fraudulent, they contended, no property could pass by the sale. 2dly, That the wines having been improperly obtained from them, they had a right to stop them *in transitu*.

Upon the first point made, Lord KENYON ruled, That, as the wines had been improperly obtained from *Bamford, Bruin, and Co.*, it was incumbent on the Plaintiff to shew, that he had fairly purchased the wines, by giving clear evidence of the agreement with *Shevill*.

The Plaintiff proved it clearly, and also the payment of the 75*l.* for one pipe.

It was contended by the Defendant's counsel, that this entitled the Plaintiff to that one pipe only for which he had paid.

Lord KENYON said, That it was an entire agreement; and that on proving the consideration paid for one pipe, and the agreement for the remainder, he should hold, that it gave the Plaintiff a title to the whole.

Upon the second point, with respect to *Bamford, Bruin*, and Company's right to stop the wines *in transitu*, the Defendant's counsel relied, That the Plaintiff living at *Norwich*, the goods must be deemed to be *in transitu* until they arrived there; whereas here, they had arrived only at *Yarmouth*; and had never been delivered at *Norwich*: that the usual course was, to put them into lighters at *Yarmouth*, and forward them to *Norwich*; so that, until their arrival there, they were *in transitu*, and could be stopped by the owners.

For the Plaintiff, it was answered, That the goods being sent by sea, if the consignee was ready to receive them when discharged from the ship, that was a delivery, at whatever period of their course of delivery they were so received: That the consignee was not bound to receive them at his own door; it might suit his advantage to have them delivered at another place; but that here, as the wines were landed, there was a complete delivery; an act of ownership exercised on them by the Plaintiff, by taking samples, which, under the authority of the case of *Slubey v. Heyward*, 2 Hen. Blackf. 504, vested a complete property in the Plaintiff.

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LORD KENYON. There is no colour for saying that these goods were *in transitu*. I once said, that, to confer a property on the consignee, a corporal touch was necessary. I wish the expression had never been used, as it says too much; but here, if a corporal touch was necessary to confer a property on the consignee, it had taken place; but all that is necessary is, that the consignee exercise some act of ownership on the property consigned to him; and he has done so here: he has paid for the warehouse-room; he has tasted and taken samples of the wines. But it is said, they have not reached the Plaintiff's place of abode, where they were to be ultimately delivered; but I think there was a complete delivery at *Yarmouth*. If an action was brought against the Plaintiff for the price of the wines, was not the delivery at *Yarmouth* such a delivery as would make him liable for goods sold and delivered? I think it would: the consignee had then ceased to have any further care of them; he had delivered them to the Plaintiff's agent, according to the bill of lading; his responsibility was then at an end, and it was transferred to the Plaintiff. I am therefore of opinion, that the delivery was complete; and, of course, that there was no right in *Bamford, Bruin, and Co.*, to stop them *in transitu*.

The Plaintiff consented to take a verdict for 75 l. only, on receiving an indemnity against any action which *Shevill* might bring on the agent.

The *Attorney General* and *'Espinasse* for the Plaintiff.

Erskine, Gibbs, and Park for the Defendant.

HOCKLESS *et alt.* v. MITCHELL.

Where there are several owners of a ship who bring an action for damage done to her, a release from one of the owners only will be sufficient to render the master a competent witness; neglect being imputed to him, so that he might be liable for negligence over to the owners.

THIS was an action of trespass *vi et armis*, brought by the Plaintiffs, who were the joint owners of a sloop, called the *Duke of Cumberland*, of *Whitstable*, in *Kent*, to recover damages against the Defendant, who was a lieutenant in his Majesty's navy, for the cutting away and destroying the sails and rigging of the Plaintiffs sloop.

The Defendant pleaded a justification, that he was, at the time of the trespass committed, commander of his Majesty's gun-brig the *Boxer*, then lying at anchor in the river *Thames*; that the sloop stated in the declaration, was sailing down the river, under the direction and guidance of the Plaintiffs servants, who so negligently and carelessly steered and directed her, that she ran foul of the gun-brig, and became entangled with her; wherefore, in order to extricate her, and for her preservation, he necessarily cut the sails and rigging; which were the trespasses in the declaration mentioned.

The Plaintiff new assigned, That the injury was excessive, and not necessary for the purposes justified in the plea.

Plea of not guilty to the new assignment.

The first witness called by the Plaintiff was the sailing-master, who had the command of the sloop at the time of the injury.

He was objected to by the Defendant's counsel, as inadmissible without a release.

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A release was produced ; but it was executed by one of the Plaintiffs only.

It was for this objected to, as it ought to have been executed by all the Plaintiffs on the record, who were the joint owners of the said sloop, and who had sustained the injury.

LORD KENYON ruled, That it was sufficient if the release was executed by one ; for that, if an action was brought against the witness for neglect of his duty, in case the Plaintiffs did not recover in the present action, it would be a joint action ; in which case, a release by one would be pleadable in bar to the joint action.

The witness was then examined.

While the Plaintiff was proceeding with his evidence on the case, LORD KENYON said, That, as the issue stood on the new assignment, it was not sufficient for the Plaintiffs merely to shew the damage done, it was incumbent on them also to shew, that it was done wantonly and unnecessarily : That, whatever mischief might have been sustained, if it was done under the fair impression and belief that it was necessary for the safety of the Defendant's ship, he would not scan some little excess too closely, but would expect clear excess and unnecessary injury to be proved.

Many witnesses were examined on both sides.

The jury found a verdict for the Plaintiff.

Erskine, Park, and 'Espinasse, for the Plaintiff.

The *Attorney General* and *Jervis* for the Defendant.

December 21.

ROBERTS *et alt.* v. EDDINGTON.

The Sound List, containing the account of the arrival of ships there, is not evidence of that fact.

THIS was an action on a charter-party, by which the Defendant chartered his ship to the Plaintiffs, engaged to go on a voyage from *London* to *St Peterzburg*, and bring home a cargo of deals on their account : dangers of the sea and restraints of princes only excepted, in the common form.

The ship had not proceeded to *St. Peterzburg*.

The defence relied upon by the Defendant's counsel, was, that the ship, in the course of her voyage, had met with storms and bad weather, which had forced her into *Dantzic* after she had passed the *Sound* ; and that, during her stay there, the *Russian* embargo had been laid on ; so that, if the vessel had proceeded to *Peterzburg*, the captain and crew must have gone into slavery.

The Plaintiffs imputed the failure of the voyage to negligence and misconduct on the part of the Defendant ; and proposed to give in evidence what is termed the *Sound* List and the *Peterzburg* List, which are documents transmitted by the British consuls abroad at those different places to the merchants at home, which are publicly hung up at *Batson's* coffee-house, for the inspection of the public, and which state the arrival of the different ships at those places. By this evidence, the Plaintiffs proposed to prove, that other ships which had sailed in the same fleet with the Defendant's ship, and some even long after, had passed the *Seynd*, and arrived safe at *Peterzburg*,

terburg, and had afterwards returned safely with a cargo.

LORD KENYON. These lists cannot be received in evidence; they are not bottomed in that, without which the facts which they are offered to prove cannot be legally established before a jury; namely, they are mere representations, and not upon oath; and are therefore inadmissible.

The *Attorney General* and *Burrough* for the Plaintiffs.

Erskine, Park, and Wood, for the Defendant.

EVANS v. DRUMMOND.

Dec. 23.

ASSUMPSIT for goods sold and delivered.

Plea of non-assumpsit.

The action was brought to recover the value of a large quantity of hops. The Plaintiff charged the Defendant, in the character of a partner with one *Combrune*, who had become a bankrupt, and who had carried on the business of a brewer, under the firm of *Combrune and Company*; the Plaintiff contending that the Defendant had constituted part of that firm.

The Plaintiff produced the articles of partnership, dated in the year 1787, between the Defendant, *Combrune* and one *Bell*, for carrying on the business of brewers; and, by a clause in that deed, the

In the case of a partner whose name does not appear in the firm, he is liable for goods furnished only during the time he receives a share of the profits, unless he has been known to be a partner; in which case, he shall be liable, after he has actually ceased to be a partner, unless he has given notice of his quitting the concern.

the particular attendance and attention of *Drummond* to the business was to be dispensed with ; so that he was virtually but a dormant partner.

In 1792 *Bell* quitted the partnership.

Erskine, for the Defendant, stated his defence to be, That the demand of *Evans*, the Plaintiff in this action, commenced on the 5th of *October*, 1799, and ended in the *October* following of the year 1800 : That, in fact, the Defendant *Drummond* had actually quitted all concern with the partnership on the 10th of *March*, 1796 ; so that, at the time of the goods being furnished, he had no manner of concern with it. He then contended, that, as *Drummond* was a partner never visible in the concern, that it was not necessary to give public notice of the time when he ceased to be actually so ; but that he was not chargeable from the time when the partnership was put an end to.

LORD KENYON asked, If *Drummond*, the Defendant, was ever known to be a partner ? He added, that it was incumbent on the Plaintiff to shew that *Drummond* was ever known publicly in the partnership ; as there must be some publicity of his situation, to which the Plaintiff might be presumed to trust, otherwise he could only be charged during the time he was actually a partner, and was receiving the emoluments and profits of the business.

The Plaintiff then called a witness who had dealt with *Combrune* and Co. He was asked, With whom he conceived he was dealing ?

This question was objected to ; and LORD KENYON held, that it could not be asked.

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He was then asked, If he had ever heard *Combrune* say that *Drummond* was his partner.

This question was objected to; but Lord KENYON said, That it might be asked; for there being a private agreement between *Combrune* and *Drummond* for a partnership, *Combrune* had a right to represent to the world who was his partner, and to charge him accordingly.

A witness was then called, who said, That about three years ago, in the year 1798, *Combrune* had consulted him; and told him, That *Drummond* was discontented with the business, and wished to break up the trade, and go into the table - beer brewery.

Erskine contended, That whatever might be the effect of these declarations of *Combrune*, if made during the partnership, yet being made after the partnership had actually ceased, they could not bind him; but not receiving the assent of the Lord Chief Justice to that distinction, he proceeded with his defence.

He stated, That a bill in equity having been filed against the Plaintiff, he had, in his answer, admitted, That from the 18th day of *April* 1800, he had known that *Drummond* was not a partner with *Combrune*. From that time, therefore, he contended, that there was no colour for charging the Defendant: That the whole demand of the Plaintiff should be therefore divided into two parts; the one prior to the 18th of *April* 1800, and the other subsequent: That that subsequent to the 18th of *April*, could not be charged to the Defendant's account,

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If two partners give a joint bill of exchange for a partnership demand, and, when the bill becomes due, the holder takes the separate bill of one, the other is discharged.

he having, from that period, ceased to have any concern with the business, with the full knowledge of the Plaintiff. As to that part of the demand preceding the 18th of *April*, it amounted to 753 *l* for hops sold in *November* and *December* 1799. These he should shew were paid for; and for that purpose he produced a bill of exchange for that amount, dated in *March* 1800, at two months, which he stated had been paid.

The Plaintiff's counsel admitted the bill, but denied that it had been paid. They stated the transaction to be, that when it became due, which was in *May*, it had been renewed by another bill for the same amount, by *Combrune*.

Per Lord KENYON. Is it to be endured, that when partners have given their acceptance, and where perhaps one of two partners has made provision for the bill, that the holder shall take the sole bill of the other partner, and yet hold both liable? I am of opinion, That when the holder chooses to do so, he discharges the other partner. Here the Plaintiff has taken the bill of *Combrune*, after he admits, that he was informed that *Drummond* had nothing to do with the concern. It is a reliance on the sole security of *Combrune*, and discharges the Defendant.

Verdict for the Defendant.

The *Attorney General*, *Park*, and *Wood* for the Plaintiff.

Erskine, *Gibbs*, and *Walton* for the Defendant.

C A S E S

ARGUED AND RULED

AT NISI PRIUS,

IN THE

KING'S BENCH,

HILARY TERM, 42 GEORGE III.

SECOND SITTING IN TERM.

HAYWARD v. HAGUE, Gent.

THIS was an action of debt, for goods sold and delivered.

There was a plea of a tender, and a replication of a subsequent demand and refusal, upon which issue was joined.

The amount of the demand was not disputed.

The Plaintiff proved a demand in the month of *August*, and several subsequent applications for payment.

The bill was filed against the Defendant, on the 17th of *November*. The last application for payment was by letter, dated the 14th of *November*; which was subsequent to the tender which the Defendant had made: and the question turned

A letter demanding payment of a debt, sent to the Defendant's house, and to which an answer is returned, That the demand should be settled, is a sufficient evidence to go to the jury of demand on the issue of a subsequent demand and refusal to a plea of tender.

turned upon, Whether this demand of payment on the 14th had been legal or not?

To this effect the evidence was, That the Plaintiff's attorney had sent a letter to the house of the Defendant, demanding the money; and at the same time, complaining of his repeated breaches of promise to pay, and threatening to proceed against him. This was proved to have been delivered to a clerk, at the house of the Defendant; who brought in the letter, and returned with an answer, That it should be settled.

No notice however being taken of it for three days, the bill was filed.

Park, for the Defendant objected. That this evidence did not support the issue: That it was necessary to prove either an actual and personal demand, or an actual delivery of the letter containing it, to the Defendant himself; neither of which had in this case been done; and that there was, therefore, no evidence of a demand and refusal subsequent to the tender.

LAWRENCE, Justice, said, That there was sufficient evidence of the delivery of the letter at the Defendant's house, containing a demand; and an answer coming out, that the demand should be settled, must be presumed to have come from the Defendant himself; and that the evidence was sufficient to go to the jury to support the issue.

The Plaintiff had a verdict.

Erskine and *'Espinasse* for the Plaintiff.

Park for the Defendant.

GRIMALDI v. WHITE.

ASSUMPSIT for work and labour.

The Defendant paid *l.* into court; and pleaded *non-assumpsit*.

The action was brought by the Plaintiff, who was a miniature-painter, to recover the value of several pictures painted by him for the Defendant.

It was proved, That the Plaintiff painted miniatures of different sizes; according to which the prices varied. Specimens were hung up in his apartment, numbered; and the prices put opposite to the number. The price opposite to No. 8, was fifteen guineas; which number the Defendant had had.

The pictures had been sent home; and the Defendant, at the time, objected to the execution, as being inferior to the specimen exhibited by the Plaintiff; but he had not returned them.

The defence, upon which it was intended to rely, was this inferiority of execution, and of course of value; and the Defendant's counsel were proceeding to call witnesses, who were judges, and who had seen the pictures, to prove, that at fifteen guineas they were infinitely overcharged; and to ascertain what was the real value.

This was objected to by the Plaintiff's counsel.

LAWRENCE, Justice. In this case it is in evidence, that the charges of the Plaintiff are regulated by the different sizes of the pictures, which he exhibits as specimens of his art, and for which

If a party purchases an article at a certain price, pursuant to a specimen exhibited, and, on delivery, it is found to be of inferior performance, the party cannot, in an action for goods sold, set up the inferiority of it to the specimen; he should have returned it, and so have rescinded the contract.

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he charges the different sums set opposite to the numbers. It is proved, that he has delivered several pictures to the Defendant of the size which he ordered ; and which the Defendant received, and has not returned. The Defendant relies on the circumstances, that they are of an execution very inferior to the specimens exhibited, and which the Plaintiff undertook to paint conformable to. Where an artist exhibits specimens of his art and skill as a painter, and affixes a certain price to them, if a person is induced to order a picture from an approbation of such specimens, and the execution of it, when delivered, is inferior to the specimen exhibited, he has a right to refuse to receive it, or return it, as not being conformable to that performance which the painter undertook to execute : but if he means to avail himself of that objection, he must return the pictures ; he must rescind the contract totally. Having received it under a specific contract, he must either abide by it, or rescind it *in toto*, by returning the thing sold ; but he cannot keep the article received under such a specific contract, and for a certain price, and pay for it at less price than that charged by the contract.

The Plaintiff had a verdict for the full charge.

Gibbs and Reader for the Plaintiff.

Erskine and Burrough for the Defendant.

FORES v. JOHNES, Esq.

THIS was an action of assumpsit, for goods sold and delivered.

Plea of *non-assumpsit*.

The Plaintiff was a printseller in *Piccadilly*; and the action was brought to recover the value of a quantity of caricature prints, sold by him to the Defendant.

The order, as proved to have been given by the Defendant to the Plaintiff, was, "For all the caricature prints that had ever been published." Under this order, the prints in question had been sent to the Defendant's house in *Wales*.

The Defendant refused to receive them, on the ground, that the collection contained several prints of obscene and immoral subjects; exclusive of several being duplicates.

The Plaintiff's counsel contended, That the order was general and comprehensive, without any exception as to the subject; and that the Plaintiff, therefore, having sent prints of every description, was entitled to be paid for them.

Pet LAWRENCE, Justice. For prints, whose objects are general satire or ridicule of prevailing fashions or manners, I think the Plaintiff may recover; but I cannot permit him to do so for such whose tendency is immoral or obscene; nor for such as are libels on individuals, and for which the Plain-

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tiff

Assumpsit will not lie to recover the value of prints of an obscene, immoral, or libellous tendency.

tiff might have been rendered criminally answerable for a libel.

The cause was referred.

Erskine, Park, and Dampier for the Plaintiff.

The *Attorney General* for the Defendant.

SITTINGS AFTER TERM AT GUILDHALL.

MARSH v. ROBINSON.

A Person who make insurances as the owner of a ship, must stand so registered at the Custom-house at the time; and the production of the register from the Custom-house is conclusive evidence of ownership.

THIS was an action of assumpsit, on a policy of insurance on the ship *Speculation*, from *Ipswich* to *Chester*.

Loss by capture.

The defence was, That the interest was not truly averred to be the Plaintiff's.

The policy was effected in the names of *Elizabeth Marsh* and Son. The action was brought in the name of the Son only; and the first objection arose on the face of the policy itself.

It appeared, however, by the pleadings, that there was an averment in the declaration, that the Plaintiff was solely interested.

LE BLANC, Justice, was of opinion, That this averment let the Plaintiff in to prove a sole interest in himself, notwithstanding the policy bore the joint names of two.

To prove the sole ownership in the Plaintiff, his counsel relied on the evidence of the captain, who had

had been examined on interrogatories, in consequence of his being absent from the kingdom. The evidence was to this effect: "That he was recommended to the Plaintiff by one *Lacy*; having been unknown to him before that time: That the Plaintiff verbally gave him instructions to go on board the ship and take the command of her, to pay the seamen, and to draw bills on him for the use and on the account of the ship."

It was objected by the Defendant's counsel: That this evidence was insufficient to establish the fact of ownership in the Plaintiff, as the acts spoken to by the Plaintiff's evidence were such as might be done by the agent or broker for the ship, and proved no absolute act of ownership whatever.

But Mr. Justice LE BLANC was of opinion, That these acts were *prima facie* evidence of sole ownership, sufficient to call on the Defendant to prove, that the ownership was not sole, as the Plaintiff represented.

The Defendant's counsel stated, That the evidence he had to offer was that of the registry from the custom-house; by which it would appear, that, on the 31st of *October*, 1800, when the insurance was made, the ship stood registered at the custom-house as belonging to *Cummins, M^r Master, and Co.*; and that there was no change in the registry till *March*, 1801, when the present one to the Plaintiff was made.

Per LE BLANC, Justice. I think this conclusive evidence. By Lord *Liverpool's* act, Geo. III. where there is any change in the ownership, there

must be an indorsement on the certificate of registry, accompanied by the oath of the parties. In the case of *Camden v. Anderson* (5 Term Rep. 709.) one of the persons, who was part owner, was held not to have an insurable interest for want of the register. That, therefore, is the legal evidence of ownership; and as it appears in this case, that at the time of the underwriting the policy, the Plaintiff was not an owner standing in the registry, I think he had not an insurable interest, and must be called.

Erskine, Adam, and Gibbs for the Plaintiff.

Garrow and Park for the Defendant.

MATHEWS v. HAIGH.

The existence of a suit in a particular term preceding, may be proved by producing the declaration, tho' it will not prove the commencement of the suit.

ASSUMPSIT for money lent and advanced, with the common money counts.

The defence was, That the Plaintiff had taken acceptances of the Defendant's in discharge of his debt, which were not due at the time of the action.

A bill in equity had been filed, which had delayed the trial of the cause.

It became material to ascertain the time when the cause was commenced.

The suit was by original, and the record was of the *Hilary* term, issue having been joined in it. It was asserted by the Defendant's counsel, That the suit was commenced, as of *Easter* Term preceding.

They were not prepared with any copy of the writ, which had been sued out; but produced the declaration

declaration which had been delivered in *April*, 1801.

This was objected to by the Plaintiff's counsel, who contended, That the commencement of the suit could only be proved by the production of the writ itself, or of an office copy of it. That every case must be proved by appropriate evidence; the suing out of the writ was the commencement of the suit, and of course that commencement could be proved by the writ itself only, and not by the declaration, which was a subsequent step in the cause.

It was answered by *Gibbs*, for the Defendant, That he did not offer the declaration as evidence of the commencement of the suit; but he contended, That it was evidence of a subsisting suit at the time of which it was entitled, it being a proceeding in a cause which must be presumed to have been then commenced.

LE BLANC, Justice, said, That it was not the legal evidence of the commencement of the suit, nor could it be admitted for that purpose, the production of the writ being the legal evidence to ascertain that time; but he was of opinion, That it was evidence to establish the fact of an existing suit at the time of its being delivered.

The *Attorney General* and *Lawes* for the Plaintiff.
Gibbs and *Littledale* for the Defendant.

The causes in the King's Bench not being concluded at the commencement of the circuit, they stood over until the week prior to *Easter* term.

In the course of the vacation Lord KENYON, Chief Justice, died at *Bath*. He was succeeded by the *Attorney General*, Sir *Edward Law*, who, on his appointment, was created a Peer, by the title of Lord ELLENBOROUGH.

April 27.

MAWSON v. HARTSINK and others.

Where a person is called to impeach the credit of a witness called before, what shall be evidence.

ASSUMPSIT against the Defendants, on two bills of exchange by the Plaintiff, as indorsee of the Defendants, who had been partners in a bank, called *The Security Bank*.

One of the Defendants, *Playfair*, let judgment go by default; the two others pleaded bankruptcy, having obtained their certificates.

Their certificates were impeached, on the grounds of the two Defendants having been guilty of concealment: having lost money by gaming in the stocks: and that money had been given to induce creditors to sign their certificates.

The facts, upon the part of the Plaintiff in impeaching the certificate, were proved by a witness of the name of *Stanley Leathes*.

The Defendants proposed to impeach the credit of this witness, as a person of infamous character, and not entitled to credit.

The first witness was a person of the name of *F. Reeves*, the chief clerk of the office at *Bow-street*.

He was asked as to his knowledge of *Leathes*; and whether he would believe him on his oath?

He said, he had been before the justices at *Bow-street*;

Breet; and from what passed there, he thought him a person whom he should be very unwilling to believe..

LORD ELLENBOROUGH interfered, and said, He could not hold this to be evidence. The transaction was *ex parte*; it was upon a partial-adduction of evidence on a charge against him at a public office, from whence he had received an unfavourable opinion of *Leathes*, from a story told without an oath. If the witness derived his information from any particular source, falling within his own knowledge, it might be otherwise.

Garrow then asked, Whether, in consequence of what passed at the public office, he had made particular enquiries as to the witness's general character?

LORD ELLENBOROUGH. That cannot be evidence. That information must be from persons not on their oaths; perhaps not credible. If this was allowed, when it was known that a witness was likely to be called, it would be possible for the opposite party to send round to persons who had prejudices against him, and from thence to form an opinion, which was afterwards to be told in court, to destroy his credit.

Garrow then put his question in this way: "Have you the means of knowing what the general character of this witness was? and from such knowledge of his general character, would you believe him on his oath?"

LORD ELLENBOROUGH said, The question might be put in that way, as it would then be open for

the opposite side to ask, as to the means of knowing the witness's character; so that it could be judged of what degree of credit was due to the assertion, from the means that the witness then called, had, of informing himself and forming his judgment.

Verdict for the Plaintiff.

Erskine and ——— for the Plaintiff.

Garrow and *Warren* for the Defendants.

**GARRATT *et al.* Assignees of SADLER,
a Bankrupt, v. Sir THEOPHILUS
BIDDULPH.**

Though a commission of bankruptcy may be rendered void by reason of the petitioning creditor taking money or goods from the bankrupt, it cannot be considered as void in an action at law, but can only be superseded by the Chancellor, under statute 5 Geo. II.

THIS was an action of trover, brought by the Plaintiffs, as the assignees of one *Sadler*, a bankrupt, against the Defendant, who was Sheriff of *Warwickshire*, to recover the value of a considerable quantity of property which had belonged to the bankrupt, and which had been taken in execution by the Defendant, under a *feri facias*, directed to him at the suit of *Slade, Sadler, and Co.*

The writ had issued in consequence of a judgment confessed by the bankrupt to *Slade, Sadler, and Co.*; and was impeached by the assignees, on the ground of its being a fraudulent preference.

The act of bankruptcy was proved to have been committed on the 17th of *January, 1801.*

The commission was sued out on the petition of one *Pountney*, and was dated the 27th of *January, 1801.*

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The goods in question had been taken, under the *feri facias*, on the 21st of *January*, 1801.

The act of bankruptcy having been established after some contest, and the rest of the case having been proved, the counsel for the Defendant gave the following facts in evidence, by a witness whom they called : —

That, on the 31st of *January*, which was after the bankruptcy of *Sadler*, he had been in company with the bankrupt and *Pountney* : That the bankrupt was possessed of a fowling-piece, of the value of about 5 £ : That the bankrupt gave it to *Pountney*, saying, Take this, it will lessen your debt : That *Pountney* assented ; and took the gun, as the witness believed, to his own use : That the bankrupt then added, That he expected some money from one *Reynolds* ; that he would help him to it, and make it over to *Pountney* : That *Pountney* answered, He wished he would, as he was very poor ; and that he would not have struck the docket, had he not been compelled to do it.

Reynolds was then called ; and he proved, That he was indebted to the bankrupt ; and that the bankrupt had directed him to pay over to *Pountney* the money which he owed him : That the witness agreed to it ; and *Pountney* charged him in account with it ; but that he had not yet paid it.

Upon this evidence, the counsel for the Defendant relied upon the following clause of the statute 5 Geo. II. c. 30. ; by which it is enacted, “ That if any bankrupt or bankrupts shall, after issuing of any commission against him, her, or them, pay to the

the person or persons who sued out the same, or otherwise give or deliver to such person or persons goods, or any other satisfaction or security for his, her, or their debt, whereby such person or persons suing out such commission shall privately have and receive more in the pound in respect of his, her, or their debt, than the other creditors, such payment of money, delivery of goods, or giving greater or other security or satisfaction, shall be deemed and taken to be such act of bankruptcy whereby, on good proof thereof, such commission shall and may be superseded; and it shall and may be lawful for the Lord Chancellor, Lord Keeper, or Commissioners for the custody of the great seal of *Great Britain*, for the time being, to award to any creditor or creditors petitioning another commission; and such person or persons so taking or receiving such goods or other satisfaction as aforesaid, shall forfeit and lose, as well his, her, or their whole debt, as the whole he, she, or they shall have taken or received; and shall pay back and deliver up the same, or the full value thereof, to such person or persons as the said commissioners, acting under such new commission, shall appoint, in trust for, and to be divided amongst the other of the bankrupt's creditors, in proportion of their respective debts."

They then contended, That this case came within the words of the statute, and the commission was at an end.

Mr. Justice LEBLANC having referred to the statute, said, That he was of opinion that the evidence

dence offered, even giving it its full effect, was not sufficient to put an end to the commission. That the act had not declared the commission void, nor had it given the courts of law any jurisdiction over the question; it had pointed out the course to be pursued; and was in that respect compulsory, namely, By application to the great seal; by whom the statute declared it should and might be superseded, and then gave further powers to the Lord Chancellor. That as long, therefore, as it stood not superseded, in consequence of any order made by the Lord Chancellor, in pursuance of the powers given to him by the statute, he was bound to consider it as a good and subsisting commission.

The Plaintiffs had a verdict.

Erskine, Park, and Barrow for the Plaintiff.

Garrow and Gibbs for the Defendant.

In the next term the Defendant obtained a rule to shew cause why the verdict so obtained should not be set aside, and a verdict entered up for the Defendant; but the court discharged the rule.

TABBS v. BENDELACK. *

An American who resides with his family in England, is so far considered as a British subject, that if a ship of his is warranted to be American property, it is not to be deemed so; and if captured, the owner cannot recover.

THIS was an action of assumpsit on a policy of insurance, dated the 29th of December, 1800, and had been effected by the Plaintiff on the freight of the ship ———, on a voyage from Liverpool to Naples.

The ship was warranted to be American property. She was captured by the French in the course of her voyage; and the loss stated in the declaration was by capture.

The action was defended by the underwriters, on the ground that the warranty had not been complied with,—the ship not coming under the description of American property.

The facts of the case were, That the Plaintiff was a native of America, where he had lived; but had commanded a vessel employed in the trade between that country and England for some length of time: That in the year 1797, he married an Englishwoman; by whom he had a family: That he had, at the time of his marriage, taken a house in Liverpool; in which his family resided, and he himself, when at home: That since his marriage, he had been a voyage or two to America; from whence he had returned, and lived with his family at Liverpool; but that for the last year he had not been out of England: That in the latter end of the

* This action was tried at the sittings after Trinity Term, 1801, and, by mistake, omitted in the cases of that term.

year 1800, he had purchased the vessel in question, which was an *American*-built vessel, from her former owner, who was also an *American*. The vessel was purchased in *America*, and brought from thence to *England*, with all the regular papers, registers, and documents required for a ship belonging to that nation : And, Lastly, That the Plaintiff had not become domiciled in this country, except by the residence above stated ; and had it in contemplation to go with his family to *America*, to reside there in future.

Upon this evidence the Plaintiff's counsel contended, That the vessel was to be deemed, to all intents and purposes, an *American* vessel : That the owner was an *American* born, not domiciled in this country ; but residing here but for a short period, for the purpose of trade, and having it in settled contemplation to return. That a merely temporary residence of a foreigner, as it conferred no privileges, should carry with it no disadvantages ; the Plaintiff was still an *American* subject though resident in *England*, to which he owed but the temporary allegiance which such residence required,

It was answered by the Defendant's counsel, That the warranty in this case was to be strictly complied with ; and the question was, Whether this vessel could, under the circumstances of the case, be deemed to be *American* property ? The ship had been freighted from *Liverpool* for the voyage, by a merchant residing there, and the proceeds of the voyage were to be brought back to *England* ; and the

she was to be benefitted by them : That powers, therefore, at war with *Great Britain*, had a right to consider the ship and property on board as *British*, whether the property really belonged to a subject of *America*, or not : That as to the Plaintiff's intention to return, that could have no influence on the case, as it would scarcely be called matter of evidence.

Lord KENYON said, That he was of opinion the Plaintiff was not entitled to recover. That where a policy was underwritten, the underwriters had a right to expect the most strict adherence to the letter of the warranty : This ship was warranted to be *American* property ; — Was she so in fact ? The only matter constituting her such was, that she was the property of a person who was in fact born in *America*. This question depended, in a great degree, on the law of nations. Persons resident in a country carrying on trade, by which both they and the country were benefitted, were to be considered as the subjects of that country, and were considered so by the law of nations, at least so far as by that law to subject their property to capture by a country at war with that in which they lived : That in the great cases respecting the *St. Eustatia* captures, in an appeal at the Cockpit, by Lord CAMDEN, assisted by some of the greatest lawyers of this country, the law had been so considered, and had so been acted upon ; and in the more recent case of the *Argonaut* ; a native of this country, by being domiciled in *America*, was held to be by that means entitled to all the privileges of an *American* subject.

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The Plaintiff was nonsuited.

The *Attorney General, Erskine, Park, and Gazelee*
for the Plaintiff.

Garrow and Gibbs for the Defendant.

The KING v. SMITH *et ult.*

THIS was an indictment against the Defendants for a nuisance, in obstructing the highway at a place called *Sparrow Corner*, in the parish of *St. Botolph*, in the city of *London*, by putting in it divers bags of clothes, &c. whereby the way was obstructed.

Four of the Defendants pleaded Not Guilty.

The others justified, That in the place where, &c. was a certain place or market, called *Rag - Fair*, from time whereof the memory of man was not to the contrary; and so justified the putting the bags there, for the purpose of sale.

The replication denied that it was such a fair, or market.

Gibbs, in stating the case on the part of the prosecution, said, That the place had been used for a market, for the sale of clothes, &c. for about twenty-five years; but that that was an encroachment, and never acquiesced in.

Lord ELLENBOROUGH interrupted him, and said, That upon that statement, it appeared to him the indictment could not be maintained against those

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Where a place has been used as a public fair or market for above twenty years, to which persons have resorted for the purpose of there exposing articles to sale, they shall not be liable to be indicted for a nuisance, as for obstructing the highway, if fairly engaged in using the place as a fair or market.

CASES AT NISI PRIUS,

who had pleaded not guilty, as it appeared to have been used as a fair or market for that time : that after twenty years acquiescence, and it appearing to all the world that there was a fair or market held there, he could not hold a man to be criminal who came there under the belief, that it was such a fair or market legally instituted. If the fair or market was not a legal one, the party might be proceeded against for usurping the franchise ; but it being enjoyed as a public fair or market for twenty years, that, in his opinion, was an answer to the criminal part of the charge, if the market had been used without interruption.

His Lordship therefore directed an acquittal.

Gibbs and Dampier for the Plaintiff.

Erskine and *'Espinasse* for the Defendant.

SITTINGS AFTER TERM
IN THE COMMON PLEAS,
AT GUILDHALL.

CHEYNE v. KOOPS.

In an action for a debt due by several partners, one of them who has not been joined in the action, cannot be made a witness for the Defendant by any release from him.

ASSUMPSIT for goods sold and delivered to the Defendant, trading under the firm of the *Neckinger-Mill Company*.

Plea of non-assumpsit and special notice, That the several supposed promises and undertakings were with one *Barnard Evans* ; and that *Evans* was indebted

debted to the Defendant in more money than the amount of the Plaintiff's demand.

To prove the set-off, and the nature of the dealing of the Defendant with *Evans*, the Defendant's counsel called a witness of the name of *Carpenter*.

He was asked, on his *voir dire*, Whether he was not a partner in the concern of the *Neckinger-Mill* Company? He answered, That he had a small share in it. He was then objected to.

To restore him to competency, the counsel for the Defendant offered to give him a release; and he offered to release the Defendant.

The Plaintiff's counsel contended, That this would not be sufficient: That the Plaintiff had a right to have him as a security for his costs, he being proved to be a partner, to which, by defeating the present action, he would not be subjected; and that, therefore, without a release from the Plaintiff, he could not be admitted.

The defendant's counsel contended, That, under the present record, no recovery against the Defendant could affect the witness, as the Plaintiff could never call upon him: That he could only be liable to contribution to *Koops*, in case *Koops* was called upon to pay under this verdict; if, therefore, *Koops* released him from any demand on account of that contribution, he released him from the only way in which he could be interested.

Lord ALVANLEY said, He thought the witness was not admissible; that there was an interest in the witness, which could not be released by the mode proposed: The partners were all bound in equity to contribute; and though, if an action

at law was brought against the witness, he could plead the recovery in the present action, which would be a bar at law; yet if *Koops*, the Defendant, was dead, or insolvent, the present Plaintiff would have a right, by a bill in equity, to compel all the partners to contribute; and the witness, of course, be subjected to his share.

His Lordship, however, proposed to allow the witness to be released by the Defendant; and a verdict taken, subject to the opinion of the Court: but the Defendant not being present, the release could not be given; and the

Plaintiff had a verdict.

Cockell and *Hovel* for the Plaintiff.

Shepherd and *Onslow*, Serjts. for the Defendant.

ON THE HOME CIRCUIT.

HERTFORD, MARCH 8, 1802,

CORAM HEATH, JUSTICE.

HICKS v. HANKIN.

Where a purchase is made by an agent, he is not a special agent if he has any discretion to exceed the sum ordered to be given by his principal; if he has such a discretion, the principal is bound by his contracts, though they exceed the sum which he is ordered by his principal to give.

THIS was an action on the case, brought to recover damages, for the breach of a special contract.

The declaration stated, That, on the 23d of April, 1801, in consideration, that the Plaintiff, at the special instance and request of the Defendant, had agreed to sell and had sold a certain quantity of brown malt, at and for the sum of 3*l.* 14*s.* per quarter,

quarter, for each and every quarter, to be paid by the Defendant to the Plaintiff at a certain time, long since past; the Defendant undertook and faithfully promised to take away the said malt within a reasonable time then next following, and to pay the Plaintiff the said price or sum for the same at the time so agreed upon as aforesaid.

The contract in question had been made at *Stortford* market. It was produced, and was in the following words:

“ Sold Mr. *George Hankin* 320 quarters of
 “ *Hicks's* malt, at 74 shillings.
 (Signed) “ *J. Taylor.*”

J. Taylor was called. He said, he was a malt-factor at *Bishops Stortford*: That he was employed by the Plaintiff to sell the malt: That he had entered into the contract in question with *Joseph Hankin*, to whom he delivered a copy of the sale-note: That he had known *Joseph Hankin* for many years, who was the son of the Defendant: That he had done his father's business, and made his contracts at market, the Defendant being a considerable dealer in corn: That he was paid by the Plaintiff, and not by the Defendant.

Best, Serjt. for the Defendant, objected: That the Plaintiff should be nonsuited: That the Statute of Frauds, in order to establish a valid contract, required the note to be in writing, and signed by the parties, or their agents, lawfully authorized: That it was in evidence that *Taylor* was employed by *Hicks*, the Plaintiff, by whom he was paid; he was the

agent therefore of the Plaintiff only, and as he only had signed the sale-note, the statute was not satisfied by such signing.

HEATH, Justice, said, It was sufficient, as *Taylor* was the agent of both parties in making the contract, and that his signing was therefore valid.

The bargain having been made by Mr. *Joseph Hankin*, the son of the Defendant; the defence relied on was, that he had been acting as the agent of his father in this transaction, having been directed by him to buy at a certain limited price: That he had exceeded his authority by giving the sum in question, which was beyond that which he was authorized to give, by ten shillings a quarter; and that, of course, he being a special agent, and having exceeded his authority, his principal, the Defendant, was not bound by it.

Joseph Hankin was called, and produced the instructions in writing, which he had received from the Defendant; those instructions authorized him to give 64 s. 6 d. per quarter: He said he had communicated those instructions to *Taylor*, who said it must be a mistake, as malt then produced 74 s. 6 d.; and, at that price, the contract was concluded.

On his cross-examination, he was asked, Whether, notwithstanding his instructions so delivered by his father to him, he did not consider himself at liberty to give a price beyond 64 s. 6 d.?

He answered, That he did.

HEATH, Justice. Though a special agent, acting under a limited authority, cannot bind his principal, if he exceeds his authority; such special agent must
be

be so expressly limited as to price, and be not authorized to go beyond the limits of his authority; if he is at liberty to do so, he is not a special agent. Mr. *J. Hankin* admits he did not consider himself as bound by the direction in writing of his father; he considered himself at liberty to exceed that authority: and I am therefore of opinion, that his principal is bound.

Verdict for Plaintiff.

Shepherd, Serjt., *Garrow*, and *Pooley*, for the Plaintiff.

Best, Serjt., and *Lawes*, for the Defendant.

AT MAIDSTONE,
CORAM HOTHAM, BARON.

The KING, on the Prosecution of March 15, 1802.
JACKSON, v. JOSEPH CATOR, Esq.

THIS was an information against the Defendant for a libel. The libel was contained in several letters written by the Defendant to the Prosecutor.

How far comparison of hands is evidence.

The Prosecutor lay under considerable difficulty in proving that the hand-writing in which the letters were written, was that of the Defendant, — it being in appearance different from his common character in writing.

To establish the fact of the libellous letters being of the Defendant's hand-writing, the counsel for the prosecution produced several letters, avowedly written by the Defendant; in fact, written to the Prosecutor himself, in answer to letters

written by the Prosecutor to him; and proved the fact clearly, that those letters were the Defendant's hand-writing. They then proposed to call a clerk in the Post-office, who held the place of Inspector of Franks, to prove that the hand in which the libels were written, was a feigned one; and to prove that, notwithstanding the disguise, the hand in which the libels were written, was the same with that of those letters admitted to be the Defendant's hand-writing in the letters above stated.

Garrow, of counsel for the Prosecution, called *Mr. Bonner*, who was Deputy Inspector of Franks in the Post-office. He first asked him, as introductory to his giving his evidence on the principal point, the following questions:—Whether, in consequence of his situation, and the duty of his office, he had occasion to inspect the character of a great number of hands-writing? He answered, Yes. — Whether it was not part of his daily duty to look at the franks which came in, to ascertain whether they were the general hand-writing of the member whose hand they purported to be? or whether they were forgeries? — He said it was.

Whether he could discern, upon inspecting a hand-writing, whether it was the natural current hand of the person who wrote it; or whether it was an imitation of some other hand? — He said, he thought [that he could easily discern whether the hand was a disguised one or not.

He was then asked, Whether he thought that he had acquired a knowledge, by which, from comparing a hand-writing acknowledged to be the party's
hand-

hand-writing, with another, he could say that they were the same? — He answered, That he had made that part of his study.

He was then desired to look at the libels, and say, Whether they were the genuine hand-writing of the person who wrote them? — He said, he had no doubt they were written in a disguised hand; and that if a paper, so characterized, should come before him, in his office of inspector of franks, he should act upon it as not genuine.

He was then desired to look at the letters, which were proved to be the Defendant's hand-writing, and to say, if the libels were the same hand-writing?

This was objected to by the Defendant's counsel.

The *Attorney General*. I understand the object of this evidence to be, to shew, by this witness, who has never seen Mr. *Cator* write, not only that these papers are written in a disguised hand, but that they are actually the hand-writing of Mr. *Joseph Cator*. To this evidence I object; and I do contend, That, from the moment in which justice was first administered in this country to the hour in which I am now speaking, such evidence never did enter into the head of man to tender, according to any records of the proceedings of courts of justice that have yet been heard of. I suffered the examination to proceed to this extent; which is the only extent to which, by any authority (and that authority to a certain degree questionable) it has ever been recognized in any civil case. When I say recognized, I must allude, first, To the last case that was tried before Mr. Justice LE BLANC, *Forster v. Mellish*; in

which that evidence was offered; and then the learned Judge said, It was impossible, for a moment, to think that that evidence, in the extent which it was offered, was evidence which ought to be submitted to a jury. But from a confirmed report of the case of *Revett v. Braham*, where that which is admissible has been mixed with that which is inadmissible, and where the inadmissible part has since been repudiated by my Lord KENYON (but from the want of having the written case, I have it not now in my hand to produce that, in which that noble and learned Judge did repudiate it) Mr. Justice LE BLANC did suffer that evidence to be given. I ought to have given that learned Judge credit for discriminating between the parts of that case of *Revett* and *Braham*, to what extent it was considered as admissible: It was the case of a will, signed by a person who was supposed incapable of putting a signature to a will; who was supposed to have been incapable of writing in character, — as that will appeared to be written in uniform character. Mr. *Garrow* and myself were in that case; where, for the first time, this novelty was introduced into the jurisprudence of the country; it was the first time, in a case either civil or criminal, in which that species of evidence was received. The evidence that was offered was of this sort: To one extent admissible; but to the extent to which it was offered in the case of *Forster* and *Melish*, inadmissible. You may call persons of skill to ascertain whether a hand-writing, written at broken intervals, is the genuine hand-writing of any individual?

vidual? or whether it is written at interrupted strokes, like the writing of a person attempting to imitate the hand of another. Mr. Justice BULLER's only observation was, and probably the idea of admitting the evidence at all to that extent, originated with that learned Judge (for whom no man has a higher respect than I have, and, therefore, it will not be supposed that I mean an insinuation that he wished to introduce novelties); but certainly his idea was to go to the very extent of the law, and adopt something which had not occurred to the wisdom of others who had gone before him. I do not mean any disparagement; but certainly that was the bent of his mind, and the way in which he thought the evidence admissible, was as the evidence of a person of skill, in a particular act. This will be seen by adverting to what he says: He says, Such evidence was admitted in the case of *Wells Harbour*. Now what was that case? It was a case that required the opinion of men of skill. Upon the particular subject, men of science were called, to shew the effect of the machine in removing obstructions in that harbour; and we are all men of science in writing, — we are all judges of writing; but as a question of skill, so far as it is a mere question of skill, whether it is a genuine or a feigned hand? I will not quarrel with it; but when it is carried to this extent, it then becomes dangerous; and I shall think my labours upon this point well bestowed, as an advocate, who is in some respect in the exercise of his duty, entrusted with the lives and property of his Majesty's subjects, to see that evidence so dangerous

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ous is not admitted ; which never was, in the worst of times, at any period that ever disgraced this country, offered in a court of justice. Now let us refer to what has occurred in what I am allowed to call the worst of times, the case of *Algernon Sydney* and the seven Bishops. In the case of the seven Bishops : an illustrious name, fit to adorn and improve the bench of any country, Mr. Just. POWELL, formed one of the bench in that case. They had not then got the length of proving the similitude of hands by persons who had never seen the party write. Two out of the four Judges refused such evidence in that case. In the trial of Col. *Sydney*, which I think a disgraceful one (for there was no overt act of publication in his own closet) how was his hand-writing proved ? By persons who had all of them seen him write, — by persons having the legitimate means of knowledge now received in courts of law. In the trial of the seven Bishops, witnesses were called to prove the hand-writing of the then Archbishop of *Canterbury*, and several others ; and the question arose with respect to the then Bishop of *Chichester* : and see what a tenderness there was even in those times, when it was supposed, so much of the security of the realm depended upon it, that after that trial, the Chief Justice was dismissed from his situation, and his name handed down to infamy ; I speak of Lord Chief Justice JEFFREYS. I mention this only to shew with what tenderness the court watched, even in those times, over the lives, property, and characters of his Majesty's subjects. Such evidence was
rejected

rejected by Mr. Justice POWELL and Mr. Justice HOLLOWAY. Mr. Justice HOLLOWAY is a person on whom no particular praise attaches ; but it is highly creditable to him that he could so stand out in such times. Mr. Justice POWELL says, “ Mr. Solicitor, I think you have not sufficiently proved this paper to be subscribed by my Lords the Bishops : you cannot read it.” That was proved by persons with whom they had corresponded. — Mr. Solicitor says, ‘ Not to read it, Sir ?’ — Mr. Justice POWELL. “ No, not read it ; it is too slender a proof. — I grant you, in civil actions, a slender proof is sufficient to make out a man’s hand, by a letter to a tradesman, or a correspondent, or the like ; but in criminal causes, such as this, if such a proof be allowed, Where is the safety of your life ? or any man’s life here ?” Then the Lord Chief Justice, with his usual delicacy of manners, says, ‘ I tell you what I say to it, I think there is proof enough to have it read ; and I am not afraid nor ashamed to say it ; for I know I speak with the law, say what you will of criminal cases, and the danger of people’s lives, there would be more danger to the government if such proofs were not allowed to be good.’ — Mr. Justice POWELL says, “ I think there is no danger to the government at all, in requiring good proof against offenders.” — Mr. Justice HOLLOWAY says, ‘ I think, as this case is, there ought to be a more strong proof ; for certainly the proof ought to be stronger and more certain in criminal than in civil matters. In civil matters we go upon slight proof, such as the comparison of hands,

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for proving a deed or a witness's name; and a very small proof will induce us to read it; but in criminal matters we ought to be more strict, and require positive and substantial proof: that it is fitting for us to have in such a case as this; and without better proof, I think it ought not to be read.' Lord Chief Justice says, 'You must go on to some other proof; for the court is divided in opinion about this proof.' So even at that time, about proof of handwriting, by persons never having seen the party write, they drew a distinction, which I am not now going to sustain, any further than to shew the extreme nicety and vigilance that was observed in criminal cases; and that such evidence never was admitted in any case, civil or criminal, till of late years. In the case of *Algernon Sydney*, the only comparison of hands was a comparison of the handwriting lodged in the memory of witnesses. It was there held by the court, that it was not sufficient for the original foundation of an attainder; but might be well used as circumstantial evidence, if the fact be otherwise proved. There was a further circumstance, that those very papers were found in his possession; and it was particularly addressed by Sir *Robert Sawyer* to Mr. Serjt. *Pemberton*, that in that case there was possession accompanying the papers; but I am not now desiring to go the length that was gone by those Judges in the worst of times; I am only desiring not to go further than any Judge administering the criminal law of *England* has ever yet gone: and when the Prosecutor's counsel produce remote evidence, drawn by the comparison of hands

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by a person who never saw the Defendant write, I do submit, for the safety of all his Majesty's subjects, that this evidence is not receivable.

Now let me go to that which is supposed to be the warrant for its reception. In the cause of *Revett and Braham*, the question was not merely, whether the witness had skill to discover whether it was a genuine or artificial hand? but it was produced for a further purpose,—To shew that these papers were the hand-writing of a person whom the witness had never seen write: not conceiving that any thing so irregular would have been produced, in the case of *Forster v. Mellish*, I was not so well prepared for it. Mr. Justice LE BLANC said, “Are you prepared to shew that that case has not been acquiesced under?” Not knowing of any contrary determination, I said, ‘I will not, without some authority, desire your Lordship to decide in opposition to the case.’ But I can now refer your Lordship to a case, which Mr. Garrow will recollect, for I see that he was the person who brought it forward: it is reported in Mr. Peake's *Law of Evidence*, 37 Geo. III, *Cury v. Pitt*, decided, since the case of *Revett v. Braham*; I think about a year,; but it is certainly since. It was a case that had undergone a great deal of conversation; and, I am quite confident, that if this point should ever be resuscitated, that it never will be recognized as law to the extent that has been urged. That was a case of a bill of exchange: the Defendant insisted the acceptance was a forgery; and, among other evidence, to prove the Defendant's hand-writing, the Plaintiff called a witness of the name of *Culson*, who was an Inspector

tor of Franks at the Post-office, to prove that he had frequently seen franks pass the office in the Defendant's name, he being a Member of Parliament; and that, from the character in which those franks were usually written, he believed this acceptance to be the Defendant's hand-writing: — he had never seen the Defendant write. Lord KENYON said, This is not admissible evidence. The farthest extent to which the rule had been carried, was to admit a person who had been in the habit of holding an epistolary correspondence with the parties, to prove the hand-writing, from the knowledge he acquired in the course of that correspondence. A case, reported by *Fitzgibbon*, was the first in which such evidence was admitted: that evidence was admitted on sound principles; for if where letters are sent, directed to a particular person, on particular business, an answer is received in due course; it is a fair presumption that the answer was written by the person whose hand-writing it purported to be; but the franks sent to the office might be the Defendant's hand-writing, or they might be forgeries; as well as the present; for no communication was had on the subject with the Defendant. Mr. *Garrow* then asked the witness, Whether, having been used to detect forgeries, he could say whether this was a genuine hand-writing, or otherwise? Lord KENYON said, He could not receive this; and observed, that though such evidence was received in *Revett* and *Braham*, he had, in his summing up to the jury, laid no stress upon it. This is a decision of my Lord KENYON, upon recollection of what he had recently

cently decided, with the full comprehension the mischievous consequences that might result from it. There was another case, before *Revett* and *Braham*, reported in *Peake's Nisi Prius Cases*, 20, *McPherson v. Thoytes*, where Lord KENYON says, Comparison of hands is no evidence. If it were so, the situation of a jury who could neither write nor read, would be a strange one ; for it is impossible for such a jury to compare the hand-writing. There was also another case, before Mr. Just. YATES, *Brockbard v. Woodlay*, there recited. There a paper was produced which was said to be the hand-writing of the deceased rector. In order to prove it to be the hand-writing of the person whose name it bore, the Plaintiff's counsel offered to produce many of the returns of the spiritual courts, of the births and burials made in the time of the rector, and signed with his name ; and upon comparing the hand-writings with the returns, it was said it would appear that the hand-writing was the same. But Mr. Justice YATES says, " I have no doubt to reject this evidence as not admissible : I do not know any case where comparison of hands has been allowed to be evidence at all : no trial can be decided by opinion and speculation ; but by evidence, where the witness has seen the party write, and speaks to his belief of that writing, which is produced in evidence, being the party's hand-writing, that is evidence ; but where it is merely opinion, on similitude of the writing collected from barely comparing them, the jury may compare them as well as any body else ; and any two people may think differently. In an indict-

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ment for forgery, the evidence of a person who has seen the party write is sufficient. The case now in question is not like a rental, terrier, or old title-deeds; those are received without evidence of hand-writing, because of the place they come from, which gives them authenticity:" and then he adopts the same proposition that was adopted before: Suppose some of the jury can neither read or write, how are they to judge of the similitude of hands? Upon the same principles, upon which this evidence was rejected by my Lord KENYON himself, being his own recent case of *Revett* and *Braham* brought under his review, and upon these authorities, independent of any other, I submit this evidence is not admissible.

Mr. *Adam*, on the same side. It will be necessary to attend to the situation in which the Defendant stands, it is that of a criminal trial; and we are to submit, that there is not a case, or a remnant of a case, that can warrant the receiving of this evidence. Mr. *Attorney General* has travelled back to a distant period of time, and has contrasted most powerfully, by his own conduct, the difference between the administration of justice in those times and the present. I have one additional observation to make with respect to the trial of Colonel *Sidney*: not only the witnesses were persons who had all seen him write, they were not only acquainted with his hand-writing, and compared the character of the writing; but there stands upon the statute-book, after the Revolution, an act of parliament which did away even that comparison of hand,

hand, and the attainder was repealed, that it might not appear in evidence to after-ages. And, therefore, I have the sanction of the legislature for the rejection of that evidence, in *Algernon Sydney's* noted and remarkable case, an act of Parliament, which passed at a time too, when my Lord *Somers*, together with the greatest luminaries this country ever knew, assisted in the framing of that act.

I recollect perfectly in the court below, not long ago, there was a necessity of proving the hand-writing of *O'Coigley*: papers were found upon him; and the *Attorney General* of that day never thought of proving it by a comparison of hands; but called a witness who knew the hand-writing of the party: and that is the constant course. Now how does the case stand here? It stands shortly thus: Here is a paper produced for the purpose of convicting *Mr. Cator* of a libel. That paper is admitted to be a feigned and disguised hand; and witnesses are to be called to shew this feigned and disguised hand is the hand-writing of *Mr. Joseph Cator*. Who have they called? An Inspector of Franks, who takes upon him to have skill in that particular subject; and that brings it to this point: What is the principle upon which every case of that sort is decided? It must be by analogy. For instance, in the case of *Wells Harbour*, or any thing relating to hydrostatics or mechanism, a person is called to speak to the particular thing in which he has skill. But why? Because he speaks to the general laws of nature, which are invariable, in all cases and in all situations; and whether the

court hears evidence with respect to the effect of a body of water upon a bridge, or upon a dock, or upon a lock, or any other place, the immutable laws of nature equally apply. Then the jury have before them, what? They have not a butcher to talk of a gun-shot wound; because he is not to be credited upon the point to which he is called: they have not a coal-heaver to speak to the pressure of water upon a bridge; because he is not capable of speaking to that point; but witnesses are called to give evidence arising from their knowledge of the particular subject. On the other side, they do what? They call Mr. *Bonner*, an artist, who goes to the extent of proving it to be a feigned hand, and that it is not written like an original hand; but the moment he comes to talk of a comparison of hand-writing, he ceases to have his judgment depend upon any thing like a general principle; because it must depend upon his knowledge of the particular case: It must depend upon the knowledge of the particular hand-writing, and not upon his skill in the comparison of the hand-writing of Mr. *Cator* and the hand-writing of these letters; because he says, he knows nothing of his hand-writing, and has not seen him write. It is upon that principle that *Revett* and *Braham* was decided: It is upon that principle that *Cary* and *Pitt* was decided: they proved it to be a disguised hand. Lord KENYON there stopped them, and said, you shall not go farther to that extent. He was speaking of an artist; but beyond that, he was not permitted to go. I am not aware of any other case than those which have been

been referred to by Mr. *Attorney General*, except a very recent case of Mrs. *Robinson's* will, which has been three times tried. At the second trial of that cause, my Lord KENYON intimated a clear and distinct opinion, that comparison of hands by a person who had not seen the party write, was not evidence. When that cause came to be tried lately before Lord ALVANLEY, we were of opinion there was perfectly sufficient evidence to go to the jury without it; and therefore, we did not tender it. I submit, therefore, that this question has been decided in *Cary v. Pitt*. The doctrine was loosely laid down in *Revett* and *Braham*; and still confirmed by Lord KENYON's intimation in the case of Mrs. *Robinson's* will, in the court of King's Bench. I submit, therefore, upon clear and sound principles, that this evidence is inadmissible, as applicable to a criminal case; otherwise it would be opening a door to conviction, which it would be impossible for the wisdom of ages afterwards to shut. We do not agitate this question to prevent fair evidence from going before the jury; but we are anxious that nothing but legal evidence shall come before them.

Garrow, for the Prosecution. In this case the Defendant's counsel have observed, that we are not in a civil case; in which point of view I would also desire the question to be considered, as in the case of *Forster* and *Mellish*, by tendering a bill of exceptions, in case you should be induced, upon pressing arguments, to reject this evidence: here there can be no revision of it, however tainted the Defendant may be; it is past redemption, and he goes quit for ever in consequence of an error in judgment; — not so in receiv-

ing the evidence under the revision of the other Judges. To be sure, it is not a pleasant thing to have it understood that strong facts have come out, tending to shew that persons have been guilty of scandalous libels; but such persons must take their chance in standing in that condition; and there will be no failure of justice, for the court will say the learned Judge had been surprized at *Nisi Prius*; and then Mr. *Cator* comes down an entire new man at the next assizes. Upon the other evidence, excluding the evidence of men of science, I am much obliged to my learned friends, though they will not thank me for the obligation, but I am obliged to them for *Algernon Sydney's* case; about which my learned friends do not agree; because Mr. *Attorney General* says, there was evidence competent to be considered, with respect to the paper found upon him. Mr. *Adam*, however, falls foul of this, and refers to the statute. That which is called Comparison of Hand-writing, is here not comparison of hand-writing: that is what I wish to have written in large letters. Upon the whole of this argument, I am not contending for comparison of hand-writing, in the sense in which *Sydney's* case speaks of comparison of hand-writing; in which *Revett* and *Braham* speaks of comparison of hand-writing; in which Mr. JUST. LE BLANC speaks of comparison of hand-writing; or in which, in *Carey* and *Pitt*, my Lord KENYON speaks of a comparison of hand-writing; but the gentlemen are giving me a term, upon the foundation of which this evidence is to be rejected. I am asking the witness, who has acquired a greater
and

and better knowledge of hand-writing than other men, to refer to the knowledge generated and founded in his mind, and then say, Does he believe those papers to be the hand-writing of the man whose character of writing he has acquired, not by comparifon, but by being referred to a ftandard, by reference to an indisputable ftandard, which is the hand-writing of Mr. *Cator*; and by reference to which, as a man of fcience, he may give his opinion? What was done in the cafe of *Wells* Harbour? Why, they had not feen the way in which the hydraulic machine was put together; but they had ftudied mechanics, and by reference to their fcientific knowledge, they gave their opinion: which opinion, my learned friend fays, is competent to be received. But let us come a little to the cafes that have been mentioned: With refpect to the cafe of *Revett* and *Braham*, I know what my learned friend meant very well: he knew perfectly well the great extent of mind of Mr. Juftice BULLER; he fupposes he had a fort of itch for carrying things to the extreme; but, if he was that fpecies of character, he was not driving alone; he had Lord KENYON to affift him; and he had alfo Mr. Juftice ASHURST and Mr. Juftice GROSE. Here, therefore, is the court of King's Bench, upon deliberate argument, fitting at bar, receiving precifely this testimony; not receiving comparifon of hand-writing, for Lord KENYON would have rejected that. I come now then to fee what comparifon of hand-writing is. I call somebody out of the crowd: I fhew him a

paper of Mr. *Cator's* hand-writing, and say, that is a paper of Mr. *Cator's* hand-writing, he not being a man of skill : then I shew him the libel, and do the same by the jury : half of them may think it is Mr. *Cator's* hand-writing, and half may think it is not ; but here I am bringing a man of science, a man of skill in the subject. What is the knowledge of Mr. *Jackson* ? A note written to him. — What is the knowledge of Mr. *Day* ? He has received orders and a letter from him, by which he has got a knowledge of his hand-writing ; but if Mr. *Day* had had no skill in hand-writing, and I had shewn him that by which I had not made a standard by any legitimate evidence, his opinion would have no weight. But let us come to the case upon which my learned friend relies, the case of the seven Bishops, where there were two Judges against two ; and they rejected the testimony, upon the ground that they could not receive this comparison of hand-writing ; and whenever I am found offering comparison of hand-writing, I desire it may be rejected. The case of *Revett* and *Braham* was most deliberately considered. I own fairly, I was one of those who had my doubts, whether the second branch would be resisted. However, though counsel resisted, the court had no difficulty in receiving it ; but that is a question which cannot be treated at *Nisi Prius* slipantly ; it was a new trial of an ejectment ; Mr. Serjt. *Shepherd*, and I, and Mr. *Mingay*, were on the same side. There had been a verdict adverse to *Revett* ; there was a supposed difficulty ; but that did not conclude the party. Might he not have

have brought another action, and tried it at the bar in the Exchequer? Might he not have tried it in the Common Pleas? I do not wonder that they are a little sore about it, as, I take it, they are by their overt acts; for my client is in possession of a considerable estate in consequence of it. It does so happen, that I was counsel in that case of *Carey and Pitt*: it was an action brought upon a clear forgery of the name of Mr. *William Morton Pitt*; and no cases can be less alike than *Revett and Braham* and *Carey and Pitt*. I was for the Plaintiff; and I could not pick up amongst all mankind, one who had ever seen Mr. *Pitt* write, to say it was Mr. *Pitt's* hand-writing: it was sent to the Postmaster; not to compare by a standard, proved by witnesses to be the hand-writing of Mr. *Pitt*, and then desiring the person from that Post-office to compare it; but I called a man from the Post-office to prove that letters of that character had passed as genuine franks; but the court could not receive such evidence: it was impossible. But does this touch *Revett* and *Braham*? Does this touch the case I have here? I could do nothing in this case without establishing my standard, without having well proved the hand-writing of Mr. *Cator*; but the moment I have done that, and put them into the hand of a person of skill, I can ask, Is that, from your knowledge of the subject, the same hand-writing?

I have practised a good deal in criminal courts, and before some of the first Judges that ever adorned any country; and I shall never forget how many useful lessons I have learned from that excellent and

valuable Judge, who is now no more. Every body knows I speak of Mr. Justice BULLER, Was there any man ever went more slowly and cautiously to his conclusions than Mr. Justice BULLER? And yet, at the hazard of Mr. *Attorney General* contradicting me, in reply, I say this, That in every case there is no distinction between the rules of law, as they apply to criminal cases, and as they apply to civil cases, I invite any body who has an appetite, to stand forward and contradict me. I say, in the principles in which causes are to be tried, there is no distinction between an action for goods sold and delivered, an action upon a bill of exchange, and on an indictment for a capital felony; but, in favour of life, Judges refer it to juries to look at the evidence with more caution, and endeavour to take care they are not imposed upon. And how can it be otherwise? What security would there be, if there was one rule of law in an action for 20 or 30,000*l.* against Mr. *Cator*, and a different rule of law, if it was on a bill for forgery, exhibited in the court below? I am not contending for a comparison of hand-writing; I am referring to the skill and judgment of a person, with respect to whom the jury are to judge. It may be contrasted, with the evidence of others more or less knowing upon the subject: Suppose a person was called who had not recently seen the party write. Suppose a schoolmaster had a boy who had never got more than the length of writing his name, and could never read it: afterwards the schoolmaster would say, I could never get this fellow any forwarder; he always wrote his name in this manner; he has not
fagacity

agacity enough to alter his character. It depends upon figures, characters, and a thousand other things; but he could not speak like a man of science, such as the witness I have offered. I will again also remind your Lordship, that if you should be induced to say you will not receive this evidence, you close the door upon enquiry in future, and shut out the administration of justice upon this most important point.

Mr. Serjeant *Best*, on the same side. After this argument has been so fully gone into by Mr. *Garrow*, I shall make but few observations; and if the effect of your Lordship's judgment should be against us, I trust your Lordship will take such measures, that the highest court in this country, out of which this record comes, shall have an opportunity of settling this point; which is not only to affect the character of the person now before the court, but to affect a most important principle. My learned friend has argued this point: he says, It would not only affect the character, but it would be attended with great anxiety on the part of Mr. *Cator*; but look at the extent to which that answer may be carried: it is an inconvenience which every man must feel who is placed in that situation. If that argument were to have any effect, no man could be prosecuted unless there was a certainty of conviction. It is at all times sufficient, if there is a probable cause.

This objection has arisen from the circumstance of its being termed a comparison of hand-writing: but it appears to me to be nothing like a comparison of hand-writing. I will not give any idea
of

of my own of comparison of hand-writing ; but I will give it in the words of the case alluded to by Mr. *Attorney General, M'Pherson v. Thoytes*. Upon what principle does the noble and learned Judge, in that case, speak of comparison of hand-writing ? There was no evidence offered by any witness who was skilled in the subject ; but here is a witness who states upon his oath, that he is competent to decide upon the question to which he is called. That circumstance appears to me to be the principle upon which, in all these cases, comparison of hand-writing ought or ought not to be received. That was a case of simple comparison of hand-writing, without producing the standard to which it was to be applied. In the case of *Carey and Pitt*, when the person from the Post-office was called to look at the hand-writing of Mr. *Pitt*, if there had been evidence laid before the court that another paper was the hand-writing of Mr. *Pitt*, I say, upon the authority of *Revett and Braham*, that evidence should have been received. Why was it rejected ? Because, in that case there was no evidence to shew, that the paper the witness was to compare it with, was the hand-writing of Mr. *Pitt* ; therefore, my learned friend might have gone on comparing *ad infinitum* ; there being no evidence that *that* with which he had compared it, was the hand-writing of Mr. *Pitt*. Look then at the case of *Revett and Braham* : Is that a case at *Nisi Prius* ? or is it the solemn determination of the whole court of King's Bench sitting at bar ? That case, therefore, is the authority of the whole

whole court, and is entitled to all the credit of a solemn determination.

There is one argument at which I am astonished, when I hear from whence that argument comes : The *Attorney General* says, That if the evidence that was offered in *Algernon Sydney's* case had been offered in a civil case, he would not say it ought not to have been received. I am not aware of any such distinction ; and it will be found to be solemnly determined in the *Attorney General* and *Eden*, in *Douglas's Reports*, that there is no distinction whatever between criminal and civil cases ; and if we look at the nature of the law of evidence, we shall see there can be no such distinction. In that case it was solemnly determined by the court of Exchequer, that there was no distinction whatever between civil and criminal cases, as to the matter of evidence in point of principle. It is quite impossible there should be any such distinction. The rules of evidence are rules of common sense. They must obtain everywhere ; whether we are sitting in a court of justice in this country, or any other ; whether we are sitting to decide upon the life of a man ; or whether we are sitting to decide upon his property, those principles, which are common sense and common justice, must apply equally to the one case as the other. Mr. *Adam* has attempted to distinguish this case from *Revett* and *Braham* : he says, *Revett* and *Braham* is distinguishable from the case of persons coming to speak upon matters of science. I confess I can see no such distinction ; and I think he is not accurate in the manner in which he has stated it. Those persons
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are speaking upon the law of nature ; and if ever there was a case in which this species of evidence ought to be received, I think this case requires it. To prove hand-writing in common cases is easy ; but when extraordinary art is made use of to conceal the real hand-writing, extraordinary art must be used for the purpose of detecting it ; and, therefore, in this particular transaction, it is undoubtedly necessary, where extraordinary art has been made use of for the purpose of concealing the hand-writing, to produce the evidence of persons of skill to detect it. I submit, therefore, under the authority of *Revett and Braham*, which has not yet been overturned, and I trust never will be overturned ; because it seems to be founded upon the principles which pervade the whole system of evidence, that this is evidence which ought to be received.

The *Attorney General* in reply. Mr. *Garrow*, and the other learned gentlemen contend, that they are not offering evidence of comparison of hands, I defy any person conversant with the plainest terms that occur in our vocabulary, to say they are contending for any thing short of comparison. What is it they contend for ? They contend, that ~~that~~ paper which the gentleman in the box has in his hand, is the same character with the standard ; but the standard itself remains to be established in his mind, who is to decide on it. It is not a question in the cause till the finding of the jury. It is *pro tempore* proved ; but is there any admitted standard ? There was no such pretence ; nor was there, in those cases, any incontestible standard.

My

My learned friends say, if this evidence is received improperly, it may be reviewed ; a new trial moved for ; and it may ultimately be set right. In the mean time, has not Mr. *Cator* the infamy of conviction saddled upon him ? In the mean time, has he not tacked to that improper rule of law the opinion of twelve men, whose opinion may be warped upon that supposition ? In a civil case, if there is an equivocal and doubtful proposition, there are greater and more convenient means of setting it right than in a criminal case. The stake in which the parties are interested is not the same : in the one case, life, fortune, and fame are at stake ; whereas property may suffer no inconvenience ; and I submit, with great confidence, that, in point of convenience in a criminal case, a Judge will not, for the first time, adopt any rule of law which has not been sanctioned by adoption in causes civil and criminal. I am not disposed to thwart, either with a view to this cause or any other, the course of justice. I will not contend to the extent I am supposed to be contending ; I will not contend that, in its full extent, the rule of criminal and civil justice is different ; but I contend this, which is marked upon the moral mind and understanding of mankind, that in proportion to the magnitude of the offence, there will be a greater or less inclination in the mind of the Judge to receive evidence, if it is doubtful. The question therefore is, Is this a rule of law, so established in our courts, that the Judge, administering the criminal justice of the country, must adopt it ? Though there have been persons of
skill

skill to collate franks, who have existed in the country for many years; and though it may be important to establish hand-writing by their means, it never was adopted till the case of *Revett* and *Braham*; and I do not believe we shall attain much legal excellence by the introduction of novelties in our practice in the best of times. Then I am not for introducing new rules. I say, that neither in civil or criminal cases, before *Revett* and *Braham*, was it ever suggested; and that noble and enlightened Judge, who had certainly admitted evidence to a certain extent upon the score of skill, repudiates that case, as I stated before, in the case of *Carey* and *Pitt*. Nothing can be said to be unquestionable evidence, while the whole is in agitation before the Judge and the jury; and, therefore, there being no standard, to which both the parties have acceded, it is still a comparison of hands; and to that whole extent does it go.

I recollect a case upon the northern circuit, of which I had the conducting, and which affected the life of the party; whose life was actually forfeited. In that case evidence of similitude of hands was proposed to me; and I was of opinion, it was not evidence to be received in a criminal case. I will state the circumstances of that particular case:—A person had robbed the house of a poor man, with whom he was most intimately acquainted. The person whose house was robbed, had discovered the robbery, and suspected the robber. It occurred to the wicked mind of this person who was suspected, to inclose in a letter a poisoned pill, with directions
that

that he should take that pill; and that pill would enable him to discover who was the robber; and stating, that about an hour after he had taken it, he would see a man ride by, and that was the man that had robbed him. The poor man took the pill; and, in the course of half an hour, the pains came on, and in a short time he expired. His body was afterwards opened; and upon its being opened, it turned out to be arsenic; and some particles of the pill adhered to the letter, by which it was ascertained to be arsenic. Now see the infinite importance of ascertaining, by other circumstances, who was the writer of this letter. I do not know whether it was written under any particular circumstances of disguise; but I called persons who knew the hand-writing, who had been at school with him, and who knew his character of hand: I had letters for the purpose of comparison, at all periods of his life; but, in the exercise of my judgment, I thought it was not evidence fit to introduce, and sought for confirmation of the hand-writing. I considered life was at stake. It might be that some enemy had done this; and, therefore, I sought for confirmatory sources of evidence. I found a man going to a place very far distant, in the habit which he usually wore, and recognized by another man, who saw him go in the same dress to the Post-office, at *Rippon*, throw a letter in and run away. With the addition of this evidence to that of persons who had seen him write, he was convicted.

In the case of *Revett v. Braham*, which I consider as repudiated authority, it has been said, why did we

not bring another ejectment, which is frequently done? Because it came out that this woman, even if she had written it, was so entirely under the controul of the person who made the will, that we know it would be bad, upon the score of controul. For this man, in order to have a dominion over her spirit, had hired people to fire guns near her, and throw her into trepidation and alarm; but my Lord KENYON repudiates this authority, and would not receive the same evidence when it was afterwards tendered. Another learned counsel talks about superscription; but was it ever considered that a letter is evidence against a man because of the address and the superscription? All that we contend for upon that is, where the party answers it, orders are given, goods are sent accordingly, received, and paid for: all this is a recognition that the party, whose name is at the bottom of the order, received the goods which he ordered, by the fact of payment.

HOTHAM, Baron. This case has been argued very fully; and I have spent three weeks upon thinking of the question. I certainly cannot receive more information than I have now received; and it is my duty, such as my opinion is, to give it fairly and frankly. I perfectly agree with the counsel for the Prosecution, that there is no difference, in point of evidence, whether the case be a criminal or civil case; the same rules must apply to both: at the same time it has been stated, that one is more disposed to resist, and more cautious in receiving evidence, in a case where the party has much at stake, as in favour of life. What is the evidence here?

Two

Two persons have been called, who, having looked at these libels, have spoken, without any doubt, of their being the hand-writing of the party accused. As far as that goes, there is no objection to it. Then comes the inspector of franks, from the Post-office; he has these libels put into his hands. Now, I do not know how that gentleman could speak to the hand-writing, unless he could say he had seen the party write, or unless he had been in the habit of correspondence with him, excepting that he is called to speak as a man of science to an abstract question. In that light he has been called, and his evidence has been admitted. He is shewn these papers; and he is asked to look at them, and, without enquiring who wrote them, or for what purpose. He is asked, "From your knowledge of hand-writing in general, do you believe that writing to be a natural or fictitious hand?" His science, his knowledge, his habit, all entitle him to say, I am confident it is a feigned hand. To that there is no objection; and so far as that goes, I see no reason for rejecting that evidence.

Then comes the next and important point. It is said to him, "Now look at this paper, and tell me, whether the same hand wrote both? Why, one cannot help seeing, evidently, what must be the consequence:—I cannot conceive there is any thing in the idea of a comparison of hands, if this is not to be considered as comparison of hands. The witness says, I never saw him write in my life. Why then, I collect all my knowledge of his being the author of this, by comparing the same hand with that which other

witnesses have proved to be a natural hand : by looking at the two, he draws his conclusion. It seems to me, therefore, directly and completely a comparison of hand. This question seems to have been solemnly decided ; but when I see the same noble and learned Judge repenting of what he had suffered in the former case, and expressly saying he could not receive such evidence ; and observing, that though such evidence was received in *Revett* and *Braham*, he had, in his summing up to the jury, laid no stress upon it : this being the case, I cannot consider it so adjudged, but that I may exercise my own judgment in rejecting it.

The prosecutor produced other evidence, and the Defendant was found guilty.

Garrow, Best, Serjeant, Marryat, and Reynolds for the prosecution.

The *Attorney General, Adam, Const, and Impey*, for the Defendant.

Vide ante, Garrels v. Alexander.

C A S E S

ARGUED AND RULED

AT NISI PRIUS,

IN THE
KING'S BENCH,
EASTER TERM, 42 GEORGE III. 1802 *.

SECOND SITTINGS IN TERM
AT WESTMINSTER.

BLAKE, Exr. of DALE, v. LAWRENCE.

ASSUMPSIT on a promissory note, against the Defendant, the maker. It was dated *March* 1801, payable to the testatrix by installments of 10*l.* every three months; and in default of payment of any installment, the whole was to be payable immediately.

installments, and on failure of payment of any installment, the whole is to become due; the interest is to be calculated on the whole sum remaining unpaid, on default of any installment, and not on the respective installments at the respective times when they would become payable.

Under a particular of Plaintiff's demand, stating that the action was brought to recover the amount of a note of hand, interest on it is recoverable. When a note is payable by in-

Plea of the general issue, and notice of set-off.

The first installment was paid when it became due, being the *June* following the date of the note; after which, default was made.

The Defendant's set-off consisted of a bill of exchange of the testatrix, upon which interest for a

* In the following pages, the date is given, by mistake, 43 *Geo.* III. 1803, instead of 42 *Geo.* III. 1802, as above.

considerable time was due, and of other articles ; as goods sold, &c.

The amount of the bill, and the interest due on it, with the other articles charged in the Defendant's set-off, covered the amount of the Plaintiff's demand on the note itself, exclusive of any interest which was due on it.

The particular of the Plaintiff's demand, given in under a Judge's order, was as follows : —

“ This action is brought to recover the amount
“ of a promissory note, for the sum of one hundred
“ pounds of the Defendant, and one *Whitby*.

10c1.

A. B. Plaintiff's Attorney.”

The Plaintiff's counsel proved the note made by the Defendant ; and then contended, That they were entitled to a verdict to the amount of the note, and the whole of the interest from the time when default was made in payment of the second installment. This became important, as otherwise the Defendant's set-off covered the whole amount of the note itself.

It was answered by *Erskine*, of counsel for the Defendant,

First, That the Plaintiff should be bound by his particular ; in which he went for the amount of the note only, and did not claim interest.

Secondly, That even was the Plaintiff entitled to interest, the note being payable by installments, he could go for interest, not on the whole amount of the note, from the first default in payment ; but on the several installments, from the time when they would become respectively payable.

LORD ELLENBOROUGH. By the particular, as
delivered

delivered by the Plaintiff's attorney, the Defendant has notice of the amount of the note being claimed by the action, that is the principal ; and tho' the interest is not claimed *eo nomine* by the particular, I am of opinion the Plaintiff may recover it, as arising out of the principal so demanded by the particular.

With respect to the amount of the interest to be recovered, it is true the note is payable by installments; but on default of payment of any installment, the whole amount of the note becomes payable: there is therefore no severance as to time with respect to the debts becoming payable; by the first default, the whole becomes one debt; and from that time interest becomes payable.

The Plaintiff had a verdict.

Gibbs and Marryatt for the Plaintiff.

Erskine for the Defendant.

LAST SITTINGS IN TERM.

CHAPMAN v. LADBROOKE.

DEBT on bond.

The Defendant pleaded *non est factum*; upon which issue was joined.

The Plaintiff then prayed that the bond and condition might be enrolled; which reciting that one *Thomas Ladbroke* the Elder had died intestate, and without issue, leaving the Defendant his heir at law; that *Thomas Ladbroke* the Elder had given instructions to one Mr. *Chapman*, attorney

When a person binds himself by bond to make a voluntary conveyance of lands descended to him as heir at law, he cannot be called upon to covenant against any incumbrances of his ancestors.

at law, to prepare his will; and by such instructions bequeathed, or intended to bequeath, the whole of his personal estate, after the same was turned into money, among one *Mary Edmunds* and the children of his late sister *Mary Harrall*; that *Samuel Edmunds* the husband of *Mary*, had, before the testator's death, contracted and agreed with him for the purchase of a certain messuage, for 120*l.* and had paid in part 38*l.* It then went on to recite, that *Thomas Ladbroke* (the Defendant) being duly impressed with an opinion, and being perfectly satisfied that the said *Thomas Ladbroke* the Elder purposed the disposition of his said personal estate in manner before mentioned, had, from his being entitled as the heir at law of his said uncle *Thomas Ladbroke* the Elder, deceased, to the sum of 82*l.* the remaining part of the purchase-money for the said premises sold; and which money the said *Thomas Ladbroke* the Elder intended, pursuant to the instructions of his will, should be divided in manner before expressed, agreed immediately upon receiving the remainder of the said purchase-money, to apply and dispose of the same in manner intended by his said uncle *Thomas Ladbroke* the Elder, deceased. The condition of the bond then was, that the Defendant should, on the receipt of the said sum of 82*l.* the remaining part of the said purchase-money, pay, apply, and dispose of the same in the shares before mentioned, and also that the said *Thomas Ladbroke*, the Defendant, should, on or before *Lady Day* next, on payment of the said sum of 82*l.* the remaining part of the said purchase-money, well and properly convey

convey and assure unto the said *Samuel Edmunds*, his heirs and assigns, the said messuage, or tenement, gardens, out-buildings, and premises, in *Rugby* aforesaid, so lately occupied by the said *Thomas Ladbroke* the Elder, deceased.

The Plaintiff then suggested the following breach, pursuant to Statute 8th of *William III.* ch. 9. that the Defendant did not, nor would, on or before *Lady Day* next, after making the said writings obligatory, or at any time afterwards, although the said *Samuel Edmunds* was on that day ready and willing, and offered to pay to him, the said Defendant, the said sum of 82*l.* the remaining part of the said purchase-money in the said condition mentioned, and properly convey and assure unto the said *Samuel Edmunds* the said messuage or tenement, garden, out-buildings, and premises in *Rugby* aforesaid, in the said condition as above mentioned; but wholly refused and neglected so to do, and therein failed and made default, contrary to the form and effect of the said condition of the said writing obligatory.

The Plaintiff produced the deed which he had tendered to the Defendant to be executed, when he at the same time tendered him the 82*l.* It was read, and was found to contain a covenant against any incumbrance, &c. of the Defendant, or of his uncle the intestate.

It was objected: That he was not bound to execute that deed, as he was under no obligation to covenant against the acts of his intestate.

Lawrence, Justice. the Defendant in this case, out of motives of respect to his uncle's intentions, and without any consideration, enters into the deed

upon which the present action is brought ; by which he covenants to convey the property in question ; that is as far as his interest goes ; but he cannot be made to covenant for the acts of his ancestor ; nor could it be contended that it should be so. The deed therefore called upon him to do more than he was bound to do ; and therefore he was well warranted in refusing to execute it. The Plaintiff therefore must have nominal damages only, as there is an issue on the *non est factum*.

Verdict is.

Erskine and *Balguy* for the Plaintiff.

Espinasse for the Defendant.

SITTINGS AFTER TERM
AT WESTMINSTER.

June 3, 1803.

HARRIS, *qui tam*, v. HUDSON.

In debt *qui tam*, under the statute for usury, the day laid in the declaration is material, though laid under a sciz. and any variance from it is fatal.

THIS was an action of debt *qui tam*.

The declaration stated, that after the 29th of Sept. 1714, to wit, on the 26th of March, 1801, it was corruptly, &c. agreed between one *Thomas Stuart* and the Defendant, that the Defendant should lend to the said *Thomas Stuart* a large sum of money, to wit, the sum of 34*l.* and should forbear and give day of payment until a certain bill, bearing date the same day and year last aforesaid, drawn upon one *Thomas Stuart* by Defendant, for the sum of 35*l.* payable to Defendant, or his order, forty days after date, should become due; and that

that the Defendant should have for the lending and forbearance of the same, a premium of 1*l.* The declaration then averred the lending the said sum of 34*l.* and the forbearance and giving day of payment until the expiration of the time appointed for payment of the said bill; and that in pursuance of the said corrupt contract, on the same day and year aforesaid (to wit, the 26th of *March*) the Defendant corruptly and usuriously took and accepted the said sum of 1*l.* for the forbearance and giving day of payment of the said sum; which exceeded the rate of 5*l. per cent.* contrary to the form of the statute.

The Plaintiff proved the bill discounted, and that the discount was taken: the bill corresponded with the date; but it appeared in evidence, that the money was not advanced until the 27th of *March*, being the day after that laid in the declaration.

This was objected to as a fatal variance.

It was answered, that the 26th was laid under a *videlicet*, so was immaterial; and therefore no variance.

Lord ELLENBOROUGH. The day is material; it ascertains the time of forbearance; and it is a fatal variance.

The Plaintiff was nonsuited.

Erskine and *Wigley* for the Plaintiff.

Garrow and *Knowlys* for the Defendant.

Same day.

Doe on demise Lord SAY and SELE
v. GUY, Executor.

The legatee of a term for years, on the executor's assenting, may maintain an ejectment immediately to recover. *Query*, If the legatee of any specific legacy of a chattel, cannot also maintain an action for it?

THIS was an action of ejectment, to recover the possession of a leasehold house and premises in the parish of *St. George, Hanover Square*.

Mrs. *Mary Guy*, by her will, dated in 1801, bequeathed the house in question to the lessor of the Plaintiff, and appointed the Defendant her executor, who proved the will.

The testatrix died in *January*, 1802: upon her death, the lessor of the plaintiff applied to the Defendant (the Executor) by letter, requesting to be admitted into the possession of the house. He first answered, that having a large quantity of furniture in the house, it would not be convenient before *Michaelmas*; but by a subsequent letter he said, That finding he should not want the house so long as he supposed, he would give up the possession on the 25th of *April*. This letter was dated the 25th of *February*.

Possession was demanded on the 25th of *April*; when the Defendant said, he could not give possession till *Michaelmas*; upon which a declaration in ejectment was delivered on the 28th; one demise of which was laid on the 26th of *April*.

At the trial it was first objected by *Erskine*, that this bequest of the house, being a legacy, no action could be sustained by a legatee, without shewing an assent by the executor to the legacy; and *Young v. Holmes*, 1 *Strange* 70, was cited: that, that being necessary, there was in this case an express dissent,

different, on the part of the executor, to admit the legatee into possession until after *Michaelmas*; so that the Plaintiff had brought his action too soon.

It was secondly objected, That no action at law would lie for a legacy; that that point had been expressly decided in the case of *Deeks* and another v. *Strutt*, 5 Term Reports 690, in which the former cases of *Atkins v. Hill*, *Cowp.* 284. *Hawkes v. Saunders*, *ib.* 289, had been considered as overruled.

LORD ELLENBOROUGH overruled both objections. As to the first, his Lordship said, that it was certainly necessary to shew an assent by the executor; but that he thought there was an assent by the executor sufficient to enable the legatee to support the action, he having by this letter promised to give him possession on the 25th of *April*.

As to the second point, his Lordship said that he would reserve it; but that it appeared to him, that in the case of a chattel, a specific legacy differed materially from that of a sum in gross, chargeable upon the funds in the executor's hands, distributable in the course of administration: That by the assent of the executor to the specific legacy in question, the property vested in the legatee, and enabled him to maintain the action.

Verdict for the Plaintiff, with leave to move to enter a nonsuit.

Gibbs and *Marryatt* for the Plaintiff.

Erskine and *Ch. Warren* for the Defendant.

This case was afterwards moved; when the court of King's Bench agreed in opinion with the Lord Chief Justice; and the distinction

distinction is there adopted between a legacy of a specific thing, and a legacy payable out of the general funds of the testator's estate. A specific legacy, on the executor's assenting to it, vests in property immediately in the legatee; and he may maintain an action at law for it; but it is otherwise where it is to be payable out of the general fund. In the case of *Deeks* and another v. *Strutt*, cited at the trial, it was the case of a general legacy without any express assent of the executor appearing; but for which an action was endeavoured to be sustained at law, on the implied assent of the executor on an account of assets; which implication the court held that they could not raise.

June 3d.

SEVERIN, v. KEPPELL.

When goods are delivered under a contract, as to do something with them, and to deliver them according to the party's undertaking, and omission of the party's doing what he so undertook to do, will not sustain an action of trover, unless there has been an actual refusal to deliver.

THIS was an action of trover, for several articles of plate and plated goods, stated in the declaration.

The Defendant was a silversmith; and they had been delivered to him for the purpose of putting glasses into them. He had been applied to, on many occasions, for the articles so delivered to him; he made excuses, and said, the glass was not come from the glass-blower's: there was no denial at any time to deliver the goods, but rather excuses for not delivering them: however, in one instance, the defendant admitted that the glass was come home; but he then said, his wife was out, and he could not deliver them.—

He afterwards delivered the plated goods, and said he had sent the silver ones home; which was not true.

It was objected by the Defendant's counsel, that
on

on the evidence given, there was no conversion sufficient to support the action of trover.

Erskine, for the Plaintiff, contended, That the Defendant having, in the last instance, admitted his possession of the goods, and having made a frivolous and false pretence for not delivering the articles, after his repeated excuses before made, that it was evidence of conversion sufficient to go to the jury; particularly from the circumstance of his having returned the plated goods, and pretended to have sent home the other; which was not the case.

Lord ELLENBOROUGH said, he thought the Plaintiff should be nonsuited, as there was no evidence to sustain the action in its present form: that what begins in contract, a non-performance of what the party so undertakes to do; or a bare non-delivery of what he undertakes to deliver, is not to be considered as of itself amounting to a *tortious* conversion. There was a case in the Court of *King's Bench* some time ago, in which that principle was recognized. It was an action of trover against a carrier, for not delivering goods. If a carrier says he has the goods in the warehouse, and refuses to deliver them, that will be evidence of conversion, and trover may be maintained; but not for a bare non-delivery, without any such refusal. So in this case, the goods were delivered to the Defendant to work upon. There was no evidence of any refusal by him to deliver them; but, on the contrary, he makes excuses for not doing it. The Plaintiff must be called.

Erskine

Erskine and *Marryatt* for the Plaintiff.
Garrow for the Defendant.

Vide *Ross v. Johnson*, 5 *Burr*, 2825, where the same doctrine is held in the case of a wharfinger.

June 4th.

BROWN v. ALLEN and OLIVER.

THIS was an action of assault against two. On the part of *Allen*, one of the Defendants, the assault was proved to have been committed with more violence, and attended with more circumstances of aggravation, than was the case of *Oliver*, the other Defendant.

LORD ELLENBOROUGH, in summing up the evidence to the jury, told them, they could not sever the damages, and give more against one Defendant than against the other; but that they should therefore take it as their rule in estimating the damages, to give their verdict against both, to the amount to which they thought the most culpable of the Defendants ought to pay.

The jury found 100*l.* damages.

Erskine, *Garrow*, and *Lawes* for the Plaintiff.
Gibbs and *Const* for the Defendants.

DANGERFIELD v. WILBY.

Same day.

THE declaration in this case stated, That the Defendant was indebted to the Plaintiff 10*l.* on a promissory note for that sum, made by the Defendant, payable to the Plaintiff, with the other counts for money had and received, and on an account stated.

Where a promissory note has been given for money due by the Defendant to the Plaintiff, who declares on it, together with the money-counts, he must prove the note lost, or destroyed, before he can have recourse to the money-counts, if it appears that the money so claimed was that for which the note was given.

The Plaintiff did not produce any promissory note, which he stated to have been lost; nor offered any evidence of its being destroyed, or not in existence; but gave in evidence, That the Defendant had, on the money being demanded, apologized for not paying the 10*l.* on account of the note; and there rested his case.

Garrow, for the Defendant, objected: That it appearing by the declaration, that the cause of action arose under a note, which was stated in the pleadings, and which it appeared was in existence, the Plaintiff should not be at liberty to go into evidence of any cause of action arising out of the note, as the promise to pay, which was the only evidence, was to pay the note.

The Plaintiff's counsel contended, That the note was only evidence of the debt for money lent, or otherwise claimed by the Plaintiff from the Defendant: and that he should therefore be at liberty to abandon the note, and go for the consideration of it; which was in the present case for money lent.

Lord ELLENBOROUGH said, he was of opinion the Plaintiff was not so entitled; for as the note, for any thing that appeared in evidence, was in existence,

existence, it might be still in circulation, and the Defendant be liable to be called upon to pay it; so that he might be subjected twice to the payment of the same demand. It was therefore incumbent on him to shew it to be lost, so that the Defendant should not be again subjected to the payment of it. As to any demand therefore on account of the note, he thought the Plaintiff not entitled to recover.

The Plaintiff was nonsuited; he having relied on the promise only.

Erskine and *Espinasse* for the Plaintiff.

Garrow for the Defendant.

June 3d.

EDMONSTONE v. PLAISTED, Gent.

one, &c.

To prove that a writ issued in a particular cause, it is not sufficient to prove the precept by the filazer's book, and to give notice to the party to produce it; it should be shewn that, after the return, the Treasury was searched, and no such writ found; and that it was in the party's hands, who had notice to produce it.

THIS was an action of debt to recover several penalties from the Defendant, for practising as an attorney, without a certificate, contrary to the statute.

The first act of the Defendant, as an attorney, charged in the declaration, for which the penalty was stated to have been incurred, was the suing out a *pluries* writ by him, in a suit of *Smythes* against the present Plaintiff.

To prove this allegation in the declaration, the Plaintiff called the Deputy Filazer, who produced the Filazer's book, in which was an entry of the *precept* in the above suit. This was offered as evidence of such writ having been actually sued out; and then the Plaintiff called upon the Defendant to produce the writ, having given notice to the Defendant

Defendant to produce it ; and on his failure to do so, proposed to give a copy of it in evidence.

The Defendant's counsel objected : That this copy was inadmissible : that the writ itself ought to be produced, or an office-copy, as the writ ought to have been returned into the *Treasury*, from whence an office-copy could be had to give in evidence, and which could always be had, as the Plaintiff might be called upon by a rule to return it.

It was answered, That the process was not bailable ; and that it never was delivered to the Sheriff ; but that, under the statute, a copy of the process only was served on the Defendant, and the writ remained in the hands of the party, who was, therefore, bound to produce it, if notice was given to do so, as had been done here.

LORD ELLENBOROUGH said, That he must presume that every thing was done which legally ought to have been done : That every writ ought to have been returned : That it would, therefore, be incumbent on the Plaintiff to shew that he searched the *Treasury*, and found no such writ ; and further, That after the return of the writ, it was in the hands of the Defendant. He therefore thought the evidence, as to that part, insufficient ; and that count was abandoned.

The second count of the declaration stated, That the present Defendant did then and there file a declaration in a certain suit then depending.

Under an averment in a declaration for penalties " that the Defendant had filed a declaration in a certain suit then depending," it is sufficient evidence to produce a declaration out of the office, indorsed in the Defendant's hand-writing, as to the time for pleading, without shewing a suit otherwise commenced.

The evidence on the part of the Plaintiff, as

to

to this breach, was this:—The Plaintiff produced a declaration taken out of the office, which was written in the hand-writing of the Defendant; and which was indorsed to plead in four days: he also produced a notice of declaration filed; which was also in the Defendant's hand-writing, and had been served on the Plaintiff.

It was objected by the Defendant's counsel: that this was insufficient: That the count referred to a suit then depending, which being the same referred to in the count which had not been proved, there was therefore no such suit in proof as that in which the declaration in this cause stated a declaration to have been delivered.

It was answered, That it was sufficient for the Defendant to shew, by the production of the declaration and indorsement, that there was such a cause depending as that stated in the declaration; as the court would not presume that there was no such cause depending, when a declaration appeared to have been filed in it.

LORD ELLENBOROUGH said, he was of opinion that the production of the declaration, as taken out of the office, and proved to be in the hand-writing of the Defendant, was evidence sufficient to satisfy the averment in that count; and that the Plaintiff was therefore entitled to recover on that count; but reserved the point*.

Verdict for one penalty.

Gibbs and Lawes for the Plaintiff.

Erskine and Garrow for the Defendant.

* I believe that the point was never moved; and that the Defendant acquiesced in the verdict.

DALISON

DALISON v. STARK.

June 9th.

CASE to recover the value of a quantity of soap, sold by the Plaintiff to the Defendant.

To prove the agreement for the sale, the Plaintiff called a witness, who stated, that he was employed to procure orders for Mr. *Dalison*, the Plaintiff, who allowed him a commission for so doing; and that he had received the order from the Defendant for the soap in question.

Where an order is given verbally for goods, and the person to whom it is given puts down the terms of it in writing, as a memorandum, but it is not signed by the person ordering the goods, the terms of the order may be given in evidence, without producing the written memorandum.

He was asked, if the order was not in writing? He answered, that it was. But being particularly interrogated as to the manner in which it was made, and the circumstances of its being reduced into writing, he stated, that the order was given to him by the Defendant verbally; and that he had put it down in writing to assist his own recollection, merely as a memorandum. It was not made by the buyer, nor was his name signed to the memorandum which was made by the witness.

It was objected: That this memorandum, being in writing, ought to be produced; that it contained the terms of the sale, and was of course the best evidence; so that no parol evidence could be admitted to prove the terms of it.

It was answered, That though what was in writing contained the terms of the contract, it was not in fact the contract, the contracting party never having signed it, as he gave the order verbally.

LORD ELLENBOROUGH said, That he thought the witness might be allowed to give parol evidence

of the contract ; and that the memorandum was not necessary to be produced. This was not the case of a sale-note, or contract made by a broker, who acted between the parties, and who made the memorandum as agent to both, and as containing the terms of the contract ; in which case, the memorandum ought to be produced : but that this was the act of the witness, as a servant of the Plaintiff, to assist his memory ; and was not signed by the party : it was therefore not necessary to produce it.

The Plaintiff was nonsuited on other grounds.

Erskine and *Lowes* for the Plaintiff.

Garrow and *Gibbs* for the Defendant.

June 9th.

SMITH v. CHAMBERS.

To prove a title to the lessee of premises, in an action of trespass for breaking and entering them, the lessor is an inadmissible witness.

TRESPASS for breaking and entering the Plaintiff's close, at *Milbank*.

Plea, Not Guilty.

The trespass was committed on an embankment on the side of the river *Thames*, which the Plaintiff claimed as lessee : the Defendant also made title to the *locus in quo*, as lessee.

To prove that the place belonged to the Plaintiff, his counsel called the landlord, under whom he held it. He was objected to, as incompetent ; inasmuch, as by coming to support a title in this Plaintiff to the place in question, he was thereby establishing a title in himself to the same premises.

Erskine, for the Plaintiff, contended, That the action being trespass, was founded on possession only ;

Only ; it was therefore sufficient for him to shew the Plaintiff in possession, which the landlord could prove, and which evidence was not connected with the title. If, however, there was a covenant for quiet enjoyment from him to the Plaintiff, in that case he admitted that he was incompetent ; but in no other case : that the same principle which, if it was admitted, would render him incompetent, applied to the present case.

LORD ELLENBROUGH said, If the witness demised the premises to the Plaintiff, though without the covenant alluded to, he was bound to support the title ; as on the word "demised," a covenant in law is raised, which would support an action by the lessee against the lessor, in case he was evicted from the possession. The witness, therefore, was to support his own title to the premises by his own testimony ; and he thought he was upon that ground inadmissible : he was accordingly rejected.

The Plaintiff was nonsuited.

Erskine and *Marryatt* for the Plaintiff.

Garrow for the Defendant.

DRAKE v. SHORTER.

TROVER for a boat.

Plea of General Issue.

The case stated on the part of the Plaintiff, was, That the Defendant, who was employed in an in-
of charity, or to prevent mischief, from the act of such persons, an action of trover will not lie for it.

June 9th.
 Where an injury has been done to a chattel belonging to another, in endeavouring to do a service to such person out

vention for making a vessel sail against wind and tide, had employed the Plaintiff to work on her: That while the vessel was so working on, she took fire: That the Defendant took a boat belonging to the Plaintiff, to endeavour to extinguish it; but that she sunk, and was lost.

Garrow, for the Defendant, stated his defence to be, That while the Plaintiff was working on the vessel, it was his duty to have taken care of her; and that the interference, in this case, was to prevent the fire spreading, by means of which the accident happened; which he contended was lawful.

Lord ELLENBOROUGH said, That if the fact was so, he thought it amounted to a defence: that what might be a *tort* under one circumstance, might, if done under others, assume a different appearance. As for example: If the thing for which the action was brought, and which had been lost, was taken to do a work of charity, or to do a kindness to the party who owned it, and without any intention of injury to it, or of converting it to his own use; if, under any of these circumstances, any misfortune happened to the thing, it could not be deemed an illegal conversion; but as it would be a justification in an action of trespass, it would be a good answer to an action of trover.

The Defendant failed in proving the circumstances as to the ship being in the Plaintiff's care; so that the accident of the fire proceeded from the Defendant himself; and the Plaintiff had a verdict.

Erskine and Marryatt for the Plaintiff.

Garrow for the Defendant.

CALVART v. HORSFALL.

TRESPASS for the mesne profits of certain premises, situated in the parish of *Pancras*.

The Plaintiff proved the judgment in ejectment, in a cause of *Doe* on the demise of *Calvart v. Roe*.

To prove that the Defendant was in possession of the premises at the time of the ejectment, the Plaintiff called the person by whom the declaration in ejectment was served upon the premises: he said, That he served the declaration on a person who said his name was *Horsfall*; and that he explained to him the notice, at the foot of the declaration, to appear.

The Defendant had let the Plaintiff into possession of the premises; but no writ of possession had ever been executed after the judgment in ejectment.

Gibbs said, the only question was, Whether the Plaintiff could maintain an action of trespass for the mesne profits, without having a writ of possession executed? That as possession was necessary to maintain trespass, it appeared by the proceedings in the ejectment, that he was not in possession when the ejectment was brought, nor legally so until put into possession under the writ of possession.

LORD ELLENBOROUGH. It has been proved that the Plaintiff has been in possession by consent of the party. I hold, That being in possession by the act of the party when he brings this action, that that is sufficient to entitle him to maintain the action.

Garrow and *Barrow* for the Plaintiff.

Gibbs for the Defendant.

To entitle a party to maintain trespass for the mesne profits, it is not necessary to execute an *habere*, if the Plaintiff has been let into possession by the Defendant.

JUNE 11,

CARY V. KEARSLEY.

In an action on the case for pirating a book, it is not sufficient evidence of a general pirating, to shew that there were particular errors and mistakes in the printing of the original work, which were copied verbatim into the pirated edition.

THIS was an action on the case, for infringing the Plaintiff's copy-right in an Itinerary, or Book of Roads, of which the Plaintiff claimed to be the proprietor.

The Plaintiff proved, that for nine preceding years he had been employed in taking and preparing surveys and distances on the different roads, to the amount of nine hundred miles, which were embodied into the work ; so that the book was compiled from actual surveys made by himself.

Having proved by this means his right as author to the original work, — to prove that the Defendant's book was a piracy of it, he called a witness who had compared them : the names of places and distances generally corresponded ; but he proved that several mistakes and errors, which had crept into the Plaintiff's book in the printing, were copied verbatim into the Defendant's. These were principally in the names of places, as *Filmer Hill* for *Farmer's Hill* ; and in the signs, *the Duke of Bolton's Arms* for *the Duke of Beaufort's Arms* ; from whence he inferred that the Defendant's book was a copy from his, and not an original compilation.

LORD ELLENBOROUGH said, that he thought that proof of these errors transmitted into the Defendant's book, would not support the declaration for a general printing and pirating of the Plaintiff's work ; the Defendant was authorized to use a work published as this of the Plaintiff's, to make extracts from it into any original work of his own ; and mistaking the
names

names and descriptions, and taking such detached parts, was only using an erroneous dictionary. It was therefore necessary to go further. The sixth count however was found to correspond, in laying the particular injury, that of transcribing without his consent the particular matter.

The counsel for the Defendant were examining the witness, who was an officer of the post office, to the fact of, Whether the survey stated to have been made by *Cary* the Plaintiff, was not at the expence of the post-office, professing the object to be, to shew that the copy-right belonged to the post-office, and not to the Plaintiff; so that he could maintain no action for infringing it?

The first publisher of a book, even though he has improperly obtained the materials of it, may maintain an action for pirating it.

LORD ELLENBOROUGH. I do not know that that will protect the Defendant: at law the first publisher, even though he has abused his trust, by procuring the copy, has a right to it, and to an action against a person who publishes it without authority from him. It may be a ground in equity, as between the person entitled, and the person who first published it; but it does not destroy the right of the latter to sue a person pirating that right.

It appeared, that in the book published by *Cary*, great quantity of new matter had been added, which had been transcribed into the Defendant's book, with additions, and observations had been made on it, and several routs were broken into two; but it appeared that there was no entire particular paragraph transcribed.

It is not sufficient to support an action for pirating books, that part is found transcribed into another, for it is lawful to use former publications in composing a new work if they are fairly taken, without being made colour for publishing the original work.

LORD ELLENBOROUGH. If I adopt the works of coteremporary writers, and embody them into my own, it makes a new work.

Mr. *Erskine*. Suppose a man took *Paley's* Philosophy, and copied a whole essay, with observations and notes, or additions at the end of it, would that be piracy?

LORD ELLENBOROUGH. That would depend on the facts of, whether the publication of that essay was to convey to the public the notes and observations fairly, or only to colour the publication of the original essay, and make that a pretext for pirating it; if the latter, it could not be sustained. That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action; a man may fairly adopt part of the work of another: he may so make use of another's labours for the promotion of science, and the benefit of the public; but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term the *animus furandi*? such as was the case put by Mr. *Erskine* of *Paley's* Philosophy. Look thro' the book, and find any part that is a transcript of the other; if there is none such; if the subject of the book is that which is subject to every man's observation; such as the names of the places and their distances from each other, the places being the same, the distances being the same, if they are correct, one book must be a transcript of the other; but when, in the Defendant's book there are additional observations, and in some part of the book I find corrections of misprinting (his Lordship here pointed out some) while I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science.

I think

I think great part of the book that I have seen, Mr. *Kearsley* might fairly avow that he had taken it from Mr. *Carey's* book. I shall address these observations to the jury, leaving them to say, whether what so taken or supposed to be transmitted from the Plaintiff's book, was fairly done with a view of compiling a useful book for the benefit of the public, upon which there has been a totally new arrangement of such matter,—or taken colourable, merely with a view to steal the copy-right of the Plaintiff?

The counsel for the Plaintiff consented to be nonsuited.

Erskine, Garrow, and Holroyd for the Plaintiff.

Dallas, Gibbs, and Tomlins for the Defendant.

MILWARD, Assignee of GATES,

v. FORBES.

THIS was an action of trover by the assignees of *Gates*, a bankrupt, to recover from the Defendant the value of fifteen sacks of flour.

The case stated to charge the Defendant was, That after an act of bankruptcy committed, the Defendant had taken away from the bankrupt's house the fifteen sacks of flour, and converted them to his own use.

The Defendant had been examined before the commissioners of bankruptcy at a private examination: his examination was taken in writing; it was
dispute.

Where a person is examined at a private examination before Commissioners of bankrupts, and that examination is taken down, it is sufficient if so much only is taken down as is conceived to be necessary to be used in evidence, provided such part has been read over to him, and he has signed it. The whole of his examination to the matter in

produced

produced by the solicitor, under the commission signed by the Defendant, and offered in evidence.

Garrow, in examining the solicitor who produced the proceedings, interrogated him very particularly, Whether what was then put down, and there produced, was all that had been said by the bankrupt on his examination? or, Whether only so much was taken down as was sufficient to be made use of on the trial? contending, That all that had passed at the examination should have been taken down and produced as his deposition; as the part omitted might give a different colour to the transaction.

The witness said, That the Defendant had said more at the examination than what was so taken down; that he had taken down only what he considered as relevant; but that nothing which was relevant was omitted, whether it made for or against the party.

Lord ELLENBOROUGH asked, If the examination had been read to him before he signed it? Being answered in the affirmative, he said, That, as after the party's hearing it so stated from his own words, and the examination was read over to him before he signed it, it must be taken to be a statement of facts admitted by him; and was therefore evidence.

Garrow then stated his defence to be, That the goods in question had been procured by *Gates* from the Defendant, in consequence of a conspiracy between him and one *Winter*, to defraud the Defendant; the goods having been delivered on the *Friday* for a ready money price, when *Gates* pretended he had not then a check, but would give one on

Monday :

Monday: That on *Saturday* they were handed over to *Winter*, who was his journeyman, on which *Saturday Gates* absconded; That being therefore obtained with a fraudulent view, no property was taken from the Defendant, nor of course passed to the assignee under *Gates's* bankruptcy, so that the Defendant might resume his property; and cited *Aickle's case* *.

Per Lord ELLENBOROUGH. There was a contract, and the Defendant let the bankrupt have them on sale, and with a view to obtain payment. In *Aickle's case*, the note was given to him to discount as a servant of the prosecutor; there was no property passed to him: the cases are different. I think there is a sufficient change of property to sustain the action.

Garrow then proposed to impeach the petitioning creditor's debt; and a witness was called to prove what the petitioning creditors had said with respect to the amount of his debt, in order to bring it within 100*l*.

Lord ELLENBOROUGH said, he could not admit the declaration of a person in a case where he was not a party; and rejected it.

Verdict for the Plaintiff.

Erskine and *Marryatt* for the Plaintiff.

Garrow and *Maddock* for the Defendant.

* See *Aickle's case*, in *Leach's Crown Cases*, fol. 266, 1st Edit.

Jury 12.

HISCOX v. GREENWOOD.

If a servant employs a tradesman to do any work, who has not been employed before by his master, and the tradesman does the work without any communication with the master, though the thing to which the work was done was the property of the master, he is not liable.

TROVER for a one-horse chaise.

The case stated on the part of the Plaintiff was, That the chaise having been broke by the negligence of his servant, and without his knowledge, That the servant had, without acquainting him, and without any orders from him, taken the chaise to the Defendant, who was a coachmaker, to get it repaired: That the Defendant had never been employed by the Plaintiff as his coachmaker, or to do any work for him. Some repairs had been done to it, to a very small amount. The Defendant refused to deliver it up till paid the amount of his demand; contending, that he had a lien on the chaise, on account of the work which he had done to it.

Lord ELLENBOROUGH said, That the Defendant had no right to hold the chaise as a lien. Whatever claim of that sort he might have, he must derive it from legitimate authority: That unless the master had been in the habit of employing the tradesman in the way of his trade, it should not be in the power of the servant to bind him to contracts of which he had no knowledge, nor to which he gave his assent. It was the duty of the tradesman, when he was employed, to have enquired of the principal if the order was given by his authority; but having neglected to do so here, and the master having never employed

employed him, the master was not liable to the demand; and the detainer of the chaise was unlawful.

Verdict for the Plaintiff.

——— for the Plaintiff.

Gibbs and Garrow for the Defendant.

SITTINGS AFTER TERM AT GUILDHALL.

GRANT v. KING.

June 14th.

ACTION on a policy of insurance on the ship —, on a voyage at and from *Brest* to *London*, against *British* captures, with liberty to carry simulated papers.

The vessel was bought the middle of *July*. She then lay at *Brest*; and the insurance was effected in *August*, 1789.

The vessel sailed in the month of *March* following. The port of *Brest* was then blocked up by the *British* fleet; the Plaintiff was an *American*; and the object of the policy was to protect her from *British* captures only.

The nature of defence was, the length of time which elapsed between the sailing of the ship and the signing of the policy; which, under the authority of the case of *Chitty v. Selwyn and Martyn*, in 2 *Atk.* 359, it was contended, discharged the underwriter. In that case Lord *Hardwicke* decided, That where a ship is insured at and from a place, as long as the ship is preparing for the voyage, the insurer is liable; but if all thoughts of the voyage

Mere length of time elapsed between the signing of the policy and the sailing, is not sufficient to avoid a policy; it is matter of evidence to be left to the jury, if such a time has elapsed as amounts to an abandonment.

are

are laid aside, and the ship lies there six or seven years, with the owner's privity, it shall never be said that the insurer is liable.

LORD ELLENBOROUGH said, That to be sure, while she was in a fair state of preparation for the voyage, it was covered by the policy; but if the voyage was abandoned for a length of time, the insurers could not be held liable.

The Plaintiff, to account for the delay, called a witness, who proved the purchase of the vessel at *Brest*: That he found a great difficulty in procuring *American* sailors to navigate the vessel: That he left *Brest* and came to *England* for the purpose of procuring them; by which much time was lost, and the sailing of the ship thereby delayed.

The Defendant endeavoured to establish, That there was considerable and unnecessary delay in sending over the men from *London*; none having been sent off till the latter end of *November*.

LORD ELLENBOROUGH. Under the then existing state of affairs, at the time of underwriting the policy, the Defendant cannot spin out the time day by day. The question, Whether there was an abandonment of the original adventure? is to be decided from a fair review of all existing circumstances at the time when the voyage might reasonably be presumed to commence. Here the extreme difficulty of procuring men is to be taken into consideration. To discharge the policy, there must be a clear imputation of waste of time. Mere length of time elapsing between the sailing of the vessel and the underwriting of the policy, is not of itself sufficient to avoid the policy; it is capable of explanation You
cannot

cannot expect every act of earnest and extreme promptness, hardly short of the institution of a new adventure, shall, in my opinion, be sufficient to amount to a desertion of the policy.

It was left to the jury, who found a verdict for the Plaintiff.

Erskine and *Giles* for the Plaintiff.

Park for the Defendant.

CLARK v. GRAY.

June 14th.

THIS was an action on the case, against the Defendant, as proprietor of a stage-coach, to recover the value of a trunk sent by the Defendant's coach.

The Plaintiff had taken her place at the *Bell Savage* Inn, slept there at night, and brought her box with her to the inn; it was marked *Passenger* on the lid. On the next morning the coach set off. The guard did not take his place behind. When the coach came to *Islington*, the guard announced to the passengers that the parcels had been lost; and Mrs. *Clark's* trunk among the rest.

Gibbs stated, that the defence relied on was, That the owners had given notice, that they would not be liable for any parcel of above 5*l.* value, unless paid for as such. He then contended, That this notice applied to the case of goods only sent to be carried, and not to the case of passengers luggage.

Lord *ELLENBOROUGH* said, That it had been decided, that the luggage of passengers came within the exception.

Where carriers give notice that they will not be liable for goods lost, beyond the value of 5*l.* that extends to the property of passengers going by the coach, or other carriage; and not to goods sent to be carried only.

Erskine

Erskine stated, That notice had been given by hand-bills, and by a large board put up in the coach-office, in the following terms : —

“ Take notice, No more than 5*l.* will be accounted for any goods or parcels delivered at this office, unless entered as such, and paid for accordingly.”

It was said by the Plaintiff's counsel, That it did not appear that the Plaintiff was apprized of this notice, or knew of it in any way whatever. He said, That Judge *Buller* had laid it down, that all the coaches in the kingdom had adopted the notice for their own security. It was the duty of the passengers to make the enquiry ; and the innkeeper might rely on the general notice.

Lord ELLENBOROUGH. I think, where the party has taken the precaution mentioned, it is presumptive notice to all persons. In a case from *Lancaster*, where it was published in the county-paper, That persons in a particular manufactory would claim a lien on goods sent to be manufactured, it was adjudged, by such publication in a newspaper, to be a sufficient notice. But I must see that the Defendant did use such precaution, and give such notice. With respect to its being the general usage of all the innkeepers, I think that it is not evidence. Carriers are subjected to losses by the general law of the realm ; I therefore think, that every man must discharge himself by notice given by himself ; and that it was incumbent on him to prove that such notice was given in this case.

The Defendant proved the notice sufficient.

Gibbs

Gibbs then relied, That, under this notice, they were liable for 5*l* ; that he, at all events, was entitled to a verdict for that sum.

The Defendant denied any liability; and cited *Clay v. Willan*, 1 *H. Blackf.* 298.

LORD ELLENBOROUGH. This limits the amount of their liability; but I will reserve that point, Whether there should not be a special count on the special contract, as excepted in their notice?

Gibbs and *Marryatt* for the Plaintiff.

Erskine and *Holroyd* for the Defendant.

WYBURD v. STANTON.

June 14th

ASSUMPSIT for goods sold and delivered.

Plea of the general issue and set-off. One part of the set-off was for certain poundage and reward, before that time agreed to be paid, and then due and payable from the Plaintiff to the Defendant upon, and in respect of certain goods and merchandize before that time sold and delivered by the Plaintiff to one *James Perry Andrew*, for and in consideration of the Defendant having recommended the said *James Perry Andrew* to buy the said goods and merchandize from the Plaintiff.

A poundage agreed to be paid to a person for recommending customers, is illegal.

Upon this being stated, LORD ELLENBOROUGH said, He thought that this demand could not be supported: it was a fraud on third persons.

It was accordingly rejected.

SITTINGS AFTER TERM
IN THE COMMON PLEAS.

MARTIN v. THORNTON.

Where matters have been referred to arbitration, it is matter of evidence whether a particular matter of complaint has been subjected to the arbitrators consideration.

THIS was an action for malicious prosecution, and for maliciously holding the Plaintiff to bail.

Plea of Not Guilty.

The Defendant, Colonel *Thornton*, had employed the Plaintiff to write a pamphlet for him, respecting a dispute which he had with an officer of a regiment of Militia, then commanded by him.

In the course of that business, the Defendant had paid to the Plaintiff, as a remuneration, two sums of 70*l.* and 50*l.*: — These sums were considered by the Plaintiff as an inadequate reward; and he had sued the Defendant for a further sum of money on that account. While that action was so depending, the present Defendant had arrested the Plaintiff; and held him to bail for the two sums above mentioned, which he had so paid to the Plaintiff.

Both causes were referred to arbitration.

The arbitrator awarded, That the Plaintiff had been fully paid; but that there was no cause of action against him on account of the money which he had so been paid: and for so arresting and holding him to bail, the present action was brought.

Serjt. *Cockell*, for the Defendant, contended, That the award was conclusive evidence against any
right

right in the Plaintiff to recover; the reference having been of all matters in difference, which necessarily included the ground of the present action, the grievance complained of by it being then subsisting; and an object of complaint upon which the arbitrator had decided; and he offered the award in evidence.

It was contended not to be admissible.

LORD ALVANLEY. What amounts to accord and satisfaction may be given in evidence, under the general issue. Lord HOLT says, That it was an innovation; but it has since been well settled, that whatever goes to shew, that the Plaintiff had no cause of action, may be given in evidence under the general issue. If therefore the object of the present action had been before in claim before the arbitrator, the award was conclusive of the Plaintiff's right to recover in this action; but that must be proved.

The award was produced. It awarded, That in the cause of *Thornton v. Martin*, the Plaintiff had no cause of action; and awarded to the Plaintiff the costs: and that, in the other action, *Martin v. Thornton*, the Plaintiff *Martin* had no cause of action; and ordered certain manuscripts and printed papers to be given up; and then ordered also, that the parties should execute mutual releases.

The Defendant's counsel then called the arbitrator, to prove That the reference before him was a reference of all matters in difference; and that a claim had been made before him by *Martin*, for compensation for the injury.

An arbitrator may be called to prove what matters were claimed before him, on a reference.

This evidence was objected to ; and it was contended, That parol evidence was not admissible, as the award should speak for itself : but it was ruled by Lord ALVANLEY to be admissible and sufficient evidence.

He was accordingly examined.

The Plaintiff was nonsuited.

Serjt. *Shepherd* and *Wigley* for the Plaintiff.

Cockell and *Best*, Serjts. for the Defendant.

WILKINSON v. FRASIER.

If a sailor engages on a whaling voyage, and is to receive a certain proportion of the profits of the voyage in lieu of wages, when the cargo is sold, he may maintain an action for his wages against the Captain ; and shall not be considered as a partner.

ASSUMPSIT against the Defendant, who was the Captain of a ship employed in the Southern Whale-Fishery, to recover seamen's wages.

The action was brought, and the Plaintiff declared on the usual articles for voyages on that fishery ; by which the seamen are, by their articles, to receive a certain share of the produce of the cargo in lieu of wages.

The Plaintiff proved the articles ; which were signed by the Plaintiff, as a mariner ; and by the Defendant, as captain ; the sailing of the vessel on the voyage, and the Plaintiff's service ; and that the oil, of which the cargo was composed, had been sold, and produced a certain sum ; for the share of which the Plaintiff went.

These articles stipulated, on the part of the sailors, That they should proceed on the voyage, do their duty, &c. ; and on the part of the captain, That the produce of the voyage should be divided
in

in certain proportions: *viz.* A certain proportion to the owners, a certain proportion to the captain, and the rest to the other officers and seamen. The proportion of a common sailer was, a one-hundred and ninetieth part.

Best, Serjt. objected: That the action could not be maintained against the Captain, who was the present Defendant; because the Defendant, as well as the Plaintiff, was to be paid out of the profits of the voyage: that they were therefore partners; and as one partner could not maintain this action against another, the action was not maintainable.

Lord ALVANLEY said, He would not nonfuit the Plaintiff on such an objection: That the Plaintiff, and the other sailors, were hired by the Defendant and the owners, to serve on board the ship for wages to be paid to him; and the share was in the nature of wages, unliquidated at the time, but capable of being reduced to a certainty on the sale of the oil, which had taken place: and that he should not therefore consider them as partners, but as entitled to wages to the extent of their proportion in the produce of the voyage.

There was a verdict for the Defendant.

Cockell and *Lawes* for the Plaintiff.

Best, Serjt. for the Defendant.

END OF EASTER TERM.

C A S E S

ARGUED AND RULED

AT NISI PRIUS,

TRINITY TERM, 43 GEO. III.

SITTINGS AFTER TERM AT WESTMINSTER.

July 8th.

BIRK v. GUY, Gent.

When a debt of a bill six years standing is demanded, and the Defendant says he has paid it, and will shew the receipt, but does not, it is not such an acknowledgment as takes the debt out of the statute of limitations.

ASSUMPSIT for saddlery-work, furnished to the Defendant by the Plaintiff.

Plea of non assumpsit and the statute of limitations.

To prove a new promise by the Defendant, the Plaintiff proved, that on payment being demanded, the Defendant said that he had paid the Plaintiff's bill, and taken a receipt, which he had. On a second application being made, he again said he had paid it; and would send a copy of the receipt: a copy never was sent, and the action was then commenced.

The Plaintiff's counsel contended, That any kind of acknowledgment of a debt, took it out of the statute; and that here was an acknowledgment of the debt, which entitled the Plaintiff to recover.

Lord ELLENBOROUGH ruled, That this did not amount to a new promise as contended by the Plaintiff's counsel. He added, that this was the very case which was meant to be protected by the statute

of limitations; where a man had lost his evidence of payment: that under that circumstance, he had a right to resort to the protection of the statute.

Nonfuit.

Garrow and *Lambe* for the Plaintiff.

Marryatt for the Defendant.

DOE on the Demise of Cox and others.

EJECTMENT for premises in the parish of *Saint Ann, Limehouse*.

The notice was to this effect: — “Take notice, that you quit the premises which you hold of me, situated, &c. commonly called or known by the name of the *Waterman’s Arms*.”

The premises for which the ejectment was brought, was a public-house, called the *Bricklayer’s Arms*.

Erskine contended, That the notice was bad, as not being a proper description of the premises held by the Defendant.

But it being proved that there was no house of the sign of the *Waterman’s Arms* in the parish, and that the Defendant did not hold any other premises of the lessor of the Plaintiff, Lord ELLENBOROUGH said, If the Defendant was misled by the notice, the Plaintiff ought to be turned round: but the notice being to quit certain premises, with the words “which you hold of me,” there could, therefore, be no dispute, nor doubt of

A misdescription of the premises in a notice to quit, is not fatal, if they are otherwise sufficiently designated that the party to whom notice has been given, has not been misled by it.

of the identity of the premises ; and the notice was sufficient to entitle the plaintiff to recover.

Garrow and Carr for the Plaintiff.

Erskine and Yates for the Defendant.

July 9th.

ARCHER v. WILLINGRICE.

To subject a party to the penalties of the stat. 25 Geo. II. c. 36, for keeping a house for illegal dancing and music, it is not necessary that the party who kept the house should take money for admission.

THIS was an action of debt on the statute 25 Geo. II. c. 36, for keeping a house for dancing and music, not being licensed pursuant to the act of parliament.

The Defendant was a publican ; and it was proved, That, on every *Monday* evening, his house was opened for the reception of company : that several persons, male and female, met there to dance ; 1s. 6d. was paid for admission, not to the Defendant, but to the use of a person of the name of ——— ; who, it appeared, professed to teach dancing.

It was objected by the Defendant's counsel : That to constitute the offence in the Defendant within the statute, the house should have been used for the illegal purpose of music and dancing for profit to the Defendant ; and that if he derived no advantage or emolument from it, he was not the proper object of punishment under the act : That the person for whose benefit the money was received, was a dancing-master. *Bellis v. Burghall* was cited,

ante

ante 3 vol. 722, as deciding that this case was not within the statute.

LORD ELLENBOROUGH. It is not necessary, in order to subject a party to the penalty given by this act of parliament, that he should take money for admission. The taking of money is only evidence that the Defendant is the owner of the house where the dancing has been carried on. To the case of *Bellis v. Bughall* I subscribe as law; but it is not like this case. It is sufficient to shew that there has been dancing publicly carried on in this house belonging to the Defendant, without its being licensed by the magistrates, to entitle the Plaintiff to recover the penalty.

Verdict for the Plaintiff.

Park and Howell for the Plaintiff.

Garrow for the Defendant.

TAYLOR v. CROKER.

July 9th.

ASSUMPSIT against the Defendant as the acceptor, to recover the value of a bill of exchange, drawn by *Eversfield* and *Jones* on the Defendant, in their own favour, by them indorsed to *Sizeland*, and by him to the Plaintiff.

Plea of *non-assumpsit*.

It appeared in evidence, That at the time the bill was drawn, *Eversfield* and *Jones* were both under age: That *Eversfield* had delivered it to *Sizeland* to be discounted; and that he had misappropriated the money, by applying it to his own use. The Defendant

In an action against the acceptor of a bill of exchange by the indorsee, it is no defence that the drawers who had drawn the bill payable to themselves, and of course indorsed it, were infants when the bill was drawn.

Defendant proved a demand by *Eversfield* of the bill from the Plaintiff, stating the circumstances of its having been delivered only to be discounted, and claiming it as belonging to him.

Garrow, for the Defendant, contended, That the drawers having been under age when the bill was drawn; that though the bill might not be absolutely void, it was voidable; and that *Eversfield* had shewn that he so considered it, by applying for it to be delivered up; and which circumstances, he contended, made the instrument void in the hands of the holder.

Marryatt, on the same side, cited the case of a note given by a married woman; and which was held to be void in the hands of a *bona fide* holder.

LORD ELLENBOROUGH. If this action was against the drawers themselves, that might be a good defence; as in that case the drawers, who are stated to be infants, would be before the court, and claiming the protection which the law affords them. But though the Plaintiff derives title under them, the note is not to be considered as void in his hands. Infants may make themselves liable by a promise after full age, to pay a debt to which their infancy might otherwise be a discharge: they may here have made a new promise in this case. It would injure the circulation of bills very materially, if such facts were to be enquired into. I am of opinion the amount of the bill is recoverable.

Verdict for the Plaintiff.

Gibbs and *Espinasse* for the Plaintiff.

Garrow and *Marryatt* for the Defendant.

HOLSTEN

HOLSTEN v. JUMPSON.

June 27.

TROVER for a quantity of household furniture, which had been taken by the Defendant.

The principal question in the cause turned on the fact of property; the Defendant contending, That the goods were the property of the Plaintiff's mother, who was indebted to him; and for which debt they had been in execution.

Where goods have been seized, and a demand made in writing, it is not to be taken as conclusive evidence of property; parol evidence is admissible to explain it.

The Defendant and her mother were foreigners: they lived together; and the goods in question were taken in an apartment in their joint occupation.

To prove property in the mother, the Defendant produced a paper; which was a demand by the mother of all and singular the articles of furniture, linen, &c. belonging to her, which had been seized in *Church Lane, Chelsea* (where the goods had been taken). It was signed by the mother; but the rest of the paper was not in her hand-writing.

This was contended to be conclusive evidence of the property on her part.

The Plaintiff was proceeding to account for and explain the paper; which was opposed by the Defendant's counsel.

Garrow, for the Defendant, contended, That when a written instrument was produced, with the Defendant's name subscribed, that it was evidence that the whole was the instrument of the party whose name was to it, as the subscribing the name was the adoption of the contents of the instrument: That, by the paper produced, the goods were stated

to

to be the property of the Defendant's mother ; and the object of the evidence was to shew, that they were not ; and that it would be breaking in upon a solemn rule of evidence to admit parol testimony ; the object of which was to alter or explain away the effect of written evidence.

Erskine contended, That the Defendant's counsel having produced the paper as evidence that the goods were the property of the mother, he should be at liberty to shew the circumstances under which it was given. He admitted that he could not go into evidence to vary or contradict it ; but merely to explain it. For example, The Plaintiff's mother might have signed it, ignorant of the contents ; or for some reason which she should be permitted to explain.

Lord ELLENBOROUGH said, That he could not take the notice to be conclusive, as to the property for which the action was brought : That if the effect of the testimony about to be given, was to give a different construction to a written instrument from what it could otherwise bear, he should reject the evidence ; but this was adduced with no such view. It was merely to shew, under what circumstances the instrument was signed. The effect of receiving the evidence could not alter the rule of law. An instrument might purport to be a party's deed : was it not admissible to shew that it had been delivered as an *escrow* ? He thought it admissible evidence.

It was proved, That, in fact, both the mother and the daughter had effects in the house ; and that the demand in question was made of the effects of the
mother

mother herself; and were not those for which the action was brought.

The Plaintiff had a verdict.

Erskine and *Morris* for the Plaintiff.

Garrow and *Marryatt* for the Defendant.

DELANY v. JONES.

Monday, July 1.

THIS was an action on the case, for a libel.

Plea of Not Guilty.

The declaration stated, That the Defendant, who then carried on the business of a Stationer, intending to charge the Plaintiff with the crime of bigamy, and to bring him into danger of legal punishment, published the false and malicious libel following; that is to say,

“*Ten Guineas Reward.*

“Whereas, by a letter lately received from the *West Indies*, an event is stated to be announced by a newspaper, that can only be investigated by these means:—This is to request, that if any Printer, or other person, can ascertain that *James Delany*, Esq. (the Plaintiff) some years since residing at *Cork*, late Lieutenant in the North Lincoln Militia, was married previous to nine o'clock in the morning of the 10th of *August*, 1799, they will give notice to — *Jones* (the Defendant) No. 14, *Duke Street*, *St. James's*, and they shall receive the reward.”

An advertisement published in the newspaper concerning any person, though conveying with it an imputation injurious to the character of the party about whom it is published, is not a libel, if done *bona fide*, and with a view of obtaining information on the subject alluded to in the advertisement, by a person really interested in the discovery.

There

There was an *inuendo*, That the Defendant meant thereby to insinuate, and to be understood, that the said Plaintiff had been, and was married before the time mentioned in the advertisement, and had another wife then living; he being then married to one *Elizabeth Weston*, his present wife.

The defence relied upon and given in evidence was, That this advertisement had been inserted by the authority of the Plaintiff's wife, for the purpose of making a discovery which was important for her to know, namely, Whether the Plaintiff had another wife living? That beside this, from the terms of the advertisement, no direct slander was conveyed; without which there could be no libel. The advertisement might be to discover an heir, the legitimacy of a person, or for such like purpose; which would not be a libel.

It was answered by *Erskine*, of counsel for the Plaintiff, That, to constitute a libel, it was not necessary that the libel should be apparent to all the world. If a man sends an advertisement to a newspaper so wrapped up, that, though not intelligible to the bulk of mankind, it is so to minds more intelligent, still it was a libel; and that the libellous tendency of this advertisement could not be mistaken.

Lord ELLENBOROUGH, in summing up to the jury, said, This paper is relied upon as necessarily carrying with it the imputation that the Plaintiff was guilty of bigamy. You must be of opinion that it does carry such imputation, before you can find a verdict for the Plaintiff, as that meaning is
necessary

necessary to make the paper a libel at all. The Plaintiff's counsel contend, That you are to take into your consideration only, Whether the advertisement conveys a libellous charge against the Plaintiff or not? I am of a different opinion: I conceive the law to be, That though that which is spoken or written may be injurious to the character of the party, yet if done *bona fide*, as with a view of investigating a fact, in which the party making it is interested in it, is not libellous. If therefore this investigation was set on foot, and this advertisement published by the Plaintiff's wife, either from anxiety to know, Whether she was legally the wife of the Plaintiff? or, Whether he had another wife living when he married her? though that is done through the medium of imputing bigamy to the Plaintiff, it is justifiable: but in such a case, it is necessary for the Defendant who publishes the libel, to shew that he published it under such authority, and with such a view. The jury are therefore first to say, Whether the advertisement imputes a charge of bigamy to the Plaintiff; and if they think it does, then to enquire, Whether the libel was published with a view, by the wife, of fairly finding out a fact respecting her husband, in which she was materially interested. If it was so, the publication is not a libel; and the Defendant is entitled to a verdict.

The jury found a verdict for the Defendant.

Erskine, Garrow, Gibbs, and 'Espinasse for the Plaintiff.

Park and Marryatt for the Defendant.

MILES

MILES and another v. RAWLYNS and another, Sheriff of Middlesex.

THIS was an action on the case, against the Defendant, as Sheriff of *Middlesex*, for a false return, in returning *nulla bona* to an execution against two persons of the names of *Brown* and *Yoxton*.

Plea of Not Guilty.

The Plaintiffs proved the suing out a *test, si. fa.* in *Michaelmas* term last, the delivery of it to the Defendants, the taking goods in execution, and the return made thereto of *nulla bona*.

The defence was, That *Brown* and *Yoxton* had been bankrupts before delivery of the writ of execution to the Defendant; and that of course the property belonged to the assignees.

The Defendant proved an act of bankruptcy and petitioning creditors debt in the beginning of *October*, upon which the commission was founded; which, of course, preceded the delivery of the writ to the sheriff, and thereby established their case.

The Plaintiffs counsel relied in answer, That that commission was void.

This was proposed to be proved, That by shewing an act of bankruptcy had been committed prior to that on which the present commission was founded; and accordingly were then proceeding to prove such act of bankruptcy prior to that relied on, in order to defeat the existing commission.

Per

LORD ELLENBOROUGH. I wish to know, Whether, where there is a valid commission subsisting, it is to be annihilated, by shewing an antecedent petitioning creditor's debt, and an act of bankruptcy sufficient to support a valid precedent commission, without shewing that precedent commission sued out? It might be, that such petitioning creditors might never put any commission in motion. I know the course of decision has been so; but it always appeared to me to want consideration; and I wish to have it brought before the court for further consideration; but, at all events, after shewing such an antecedent act of bankruptcy, the party impeaching the existing commission must shew a petitioning creditor's debt then legally subsisting to support a commission.

The Plaintiffs counsel relied on the Plaintiffs own debt, as being sufficient to support a commission at the time of the former act of bankruptcy committed; it being then due under a warrant of attorney given by the bankrupt before that time.

It was insisted by the Defendants counsel, That it was not a sufficient debt on these grounds: First, That the Plaintiffs had signed a judgment on that warrant of attorney, and proceeded to execution against the bankrupt, so that they had elected to proceed at law; and that they therefore could not be good petitioning creditors. Secondly, That the warrant of attorney was given for a sum of money, with a defeasance to be void, on payment of certain bills accepted for the bankrupt: That the warrant of attorney therefore constituted the debt upon which the commission was sued out, it be-

ing to secure the payment of those bills accepted and drawn by the Plaintiff for the account of *Brown* and *Yoxton*. Until the payment therefore of those bills by the Plaintiff, no debt was created; and if *Brown* and *Yoxton* had become bankrupts, the Plaintiffs could not have proved any debt under their commission, unless they had actually paid some of the bills.

Lord ELLENBOROUGH asked, If there was any case where the proceeding under the judgment, prevented the party from suing out a commission of bankruptcy? No answer being given, he said, The warrant of attorney appeared to him to constitute a *debitum in presenti* sufficient to support the commission; but he would reserve the point. I believe the point was never after moved.

Erskine and *Wood* for the Plaintiff.

Garrow and *Gibbs* for the Defendant.

July 1818.

HILLS v. HILLS.*

Where an annuity is void for a defect in the memorial, and the grantee brings an action to recover the consideration, the grantee, under a plea of set-off, may give in evidence the whole of the payments made on account of the annuity; but if any are of more than six years standing, the Plaintiff should apply the statute of limitations.

ASSUMPSIT for money had and received.

Pleas of *non-assumpsit* and set-off; and issues on both pleas.

The Plaintiff and Defendant were brothers; and the Plaintiff being entitled to 700*l.* as his share of his father's property in the Defendant's hands, they had come to an agreement, That the Defendant

* This is the same case with that reported in 3d *East's Rep.* by the name of *Hicks v. Hicks*. The true name of the case is *Hills v. Hills*,

should

should pay to the Plaintiff an annuity of 84*l.* *per ann.* for his life.

The memorial of this annuity not having been duly registered, was void under the statute; and the Plaintiff having brought an action on the annuity-deed, the Defendant had pleaded that it was so void for want of a memorial: upon which the Plaintiff entered a *noli prosequi*; and now brought his action to recover the consideration.

The Defendant did not dispute the Plaintiff's right of action; but relied on the set-off of the payments made under the annuity, as more than covering the amount of the demand, they having been paid for eleven years; and which several payments, when taken together, amounted to a sum exceeding what the Plaintiff claimed, *viz.* 924*l.*

It was contended for the Plaintiff, That the payment of the annuity being voluntary, and made before the annuity was set aside, that the Plaintiff had a right to keep the sums so paid; and so they could not be the object of a set-off. Secondly, That even if it was the object of a set-off, the Defendant could not set off more than the sums paid within six years.

LORD ELLENBOROUGH said, That as to the first objection, they were payments on both sides; and each party entitled to them as against the other. He was of opinion, That the Defendant was entitled to set off the several payments on account of the annuity.

As to the objection, That the Defendant could only claim the payments made for the last six years,

which was the second objection, the Defendant's counsel answered, That if notice of set-off had been given, six years only could be set off; but as a set-off here was pleaded, the Plaintiff should have replied the statute of limitations to all but six years, which he had not done; but had replied generally: so that the Defendant was entitled to the whole.

Lord ELLENBOROUGH assented to the answer; and the Plaintiff was nonsuited.

Erskine, Onslow, Serjt. and 'Espinasse for the Plaintiff.

Garrow, Gibbs, and Marryatt for the Defendant.

July 13th.

Doe on Demise HARROP v. J. GREEN and G. GREEN.

In a joint ejectment, one of whom suffers judgment by default, and the other takes defence, the Defendant who has let judgment go by default, is a good witness to prove the other in possession.

THIS was an action of ejectment, to recover the possession of a house in the parish of *St. James, Westminster*, brought by the lessor of the Plaintiff, as the landlord of the premises.

J. Green, one of the Defendants, suffered judgment to go by default. The other Defendant pleaded to the action.

A notice was given by the lessor, on the 28th of *September*, to quit on the 25th of *March* following (being *March* the 25th, 1802); after which the ejectment was brought.

To prove that the premises were held of the lessor

lessor of the Plaintiff, and the commencement of the term, the Plaintiff's counsel called *J. Green*, the Defendant, who had let judgment go by default.

He was objected to, as incompetent, on the ground that, by assisting the Plaintiff to recover in this action, he enabled the Plaintiff to recover the mesne profits against the Defendant *G. Green*, and so protected himself; as he would otherwise be solely liable, by reason of his having suffered judgment to go by default.

Lord ELLENBOROUGH said, That the verdict in this cause did not prevent the Plaintiff from suing him for the mesne profits, as he had let judgment go against him. He was of opinion he therefore was an admissible witness, as the only supposed interest imputable to him, was the possibility of the Plaintiff suing the present Defendant only, in case he recovered in this action. This was not a direct interest; but a remote and only possible advantage which the witness might have, and which could not render him incompetent.

It was then objected: That the notice was served on the 28th of *September*, to quit on the 25th of *March*, which was not six months notice.

Lord ELLENBOROUGH said, It clearly was; and notice on the 29th of *September*, to quit at *Lady day* following, had been held good.

Verdict for the Plaintiff.

Erskine and *'Espinasse* for the Plaintiff,

Littledale for the Defendant.

July 16th.

The KING, on the Prosecution of
ALLEN and others, v. LLOYD.

An indictment
will not lie for
that which is a
nuisance only to
a few inhabitants
of a particular
place.

THIS was an indictment for a nuisance, preferred
by the Society of *Clifford's Inn*.

The Defendant was a tinman. The nuisance
complained of by the indictment was, That, from
the noise made by him in the carrying on his trade,
the prosecutors were disturbed in the occupation of
their chambers, and prevented from following their
lawful professions.

It was proved by the prosecutors, who were at-
tornies, that in carrying on such part of their busi-
ness as required particular attention, in perusing
abstracts, and other necessary parts of their profes-
sion, the noise was so considerable, that they were
prevented from attending to it.

It appeared, however, on the cross-examination
of the witnesses on the part of the prosecution, That
the noise only affected three numbers, viz. 14, 15,
and 16, of *Clifford's Inn*; and that by shutting the
windows, the noise was in a great measure pre-
vented.

Lord ELLENBOROUGH said, That upon this
evidence the indictment could not be sustained;
and that it was, if any thing, a private nuisance.
It was confined to the inhabitants of three numbers
of *Clifford's Inn* only; it did not even extend to the
rest of the Society, and could be avoided by shut-
ting

ting the windows ; it was therefore not of sufficiently general extent to support an indictment ; and he thought this indictment had been already carried on far enough.

The Defendant was acquitted.

Erskine, Garrow, and Conß for the Prosecutors.

Park and Marryatt for the Defendant.

SITTINGS AFTER TERM AT GUILDHALL.

DIMSDALE and others v.
LANCHESTER.

ASSUMPSIT for money paid, had, and received to the use of the Defendant, with the other money counts.

Plea, *non-assumpsit*.

The case was, That the Defendant having given her promissory note for 63*l.* it was paid into the hands of the Plaintiffs, who were bankers ; the payee having regularly indorsed it.

It was sent to the Defendant by a notary, for payment. In payment of it, he received, in part, a 10*l.* note, which turned out to be a forgery ; to recover the amount of which the present action was brought.

These facts were proved.

Erskine objected : That this action for money had and received could not be supported : That

The indorsee of a promissory note may maintain an action for money had and received against the maker.

the payment of the Plaintiffs original demand, under the Defendant's note for 63*l.* in this case was by a forged note; so that the original note of the Defendant was not thereby discharged, and the Plaintiffs might have declared as indorsee of it, and given notice to the Defendant to produce it: That the Defendant was, therefore, still liable on that note. He put the case, That the action was for goods sold, which had been paid for in a forged bill. An action for goods sold and delivered still remained: That this action was by the indorsees of the first note; and as the only dealing was through the medium of that note, there was no money of the Plaintiffs had and received by the Defendant.

LORD ELLENBOROUGH said, He thought the action was maintainable: That when a person has put his name to a promissory note, he thereby acknowledges that he has money in his hand of the payee of the note; and undertakes to pay it to whoever is legally entitled to receive it, that is to the person who shall have paid for it a good consideration; and who has thereby become the legal holder of the note.

Verdict for the Plaintiffs.

Gibbs and Giles for the Plaintiffs,

Erskine for the Defendant,

SURTEES & *alt.* v. HUBBARD.

July 16th.

THIS was an action for money had and received.

The action was brought by the Plaintiffs, as the assignees of the ship *Lady Nelson*, to recover the amount of freight.

The Plaintiffs had given a notice to the Defendant of the assignment of the ship and freight to them; but no notice to produce this notice had been given to the Defendant.

To prove this notice of the assignment, a witness was called for the Plaintiff, who proved that he had served the Defendant with a notice of the assignment; a copy of which he then produced. He swore, That the paper which he then produced, was an exact transcript of that served, was written at the same time; and that both papers were then signed by the Plaintiffs.

It was objected by the Defendant's counsel: That this was inadmissible in evidence, without a notice to produce that which had been served on the Defendant.

It was answered, That there was no distinction between this case and that of the notice to quit, which had been deemed to be sufficient, when served in the mode in which this notice was served: That both papers were originals; and so no notice to produce that served on the Defendant was necessary.

LORD ELLENBOROUGH said, He had some difficulty on the subject; as the reason of giving notice to produce any papers served on the opposite party,

was

Where an assignment has been executed of property due by a third person, and the party to whom the assignment is made, for the purpose of giving notice to such third person, prepares two notices at same time, which he signs, and serves one of them on such person, if an action is afterwards brought by the assignees, he can give that notice in evidence which he retained, without giving a notice to produce that served on the other person.

was to check a person from giving in evidence what was a false copy. He could not, however, distinguish this from the case of notice to quit; and that, on the authority of that, his Lordship said he decided, though he found difficulties in it, that the notice produced might be given in evidence.

A person of the name of *Ward* had been the owner of the ship, which had been chartered by the Defendant. *Ward* had assigned over the ship, and all the freight due by *Hubbard* the Defendant, to the Plaintiff.

When a party indebted to another consents to pay over that money to a third person, the latter can maintain *assumpsit* for it.

Erskine objected: That this action being to recover that freight, should have been in the name of *Ward*, as the contract was made with him: That it being a chose in action, could not be brought by any other person; so that the present Plaintiff could not support the action.

LORD ELLENBOROUGH. Choses in action generally, are not assignable. Where a party entitled to money assigns over his interest to another, the mere act of assignment does not entitle the assignee to maintain an action for it. The debtor may refuse his assent: he may have an account against the assignor, and wish to have his set-off; but if there is any thing like an assent on the part of the holder of the money, in that case, I think, that this, which is an equitable action, is maintainable.

An assent was proved on the part of the Defendant, to a certain amount; but which was covered by payments made by the Defendant prior to the notice.

The

The Plaintiff was nonsuited,
Gibbs and Nolan for the Plaintiff.
Erskine and Giles for the Defendant.

SITTINGS BEFORE MICHAELMAS TERM*.

HEATH v. HUBBARD.

THIS was an action of trover, to recover the value of one-third of the ship *Fishborn*, against the Defendant, who was owner of the other two-thirds.

The ship had been insured; and having been detained under the *Russian* embargo, was then abandoned to the underwriters on the 7th of *March*, 1801. A bill of sale was made to the Plaintiff, by the owners in trust for the underwriters.

Several objections were made at the trial, which were reserved for the opinion of the court. The most important of which was, Whether the bill of sale, being in trust for certain unnamed underwriters on the ship, was not void in point of law, as affording a means of covering foreign interests, and tending to defeat the provision of the Statutes 26 *Geo. III. c. 60.* and 34 *Geo. III. c. 68.* — the ship register-acts?

The proof of the conversion was, That *Hubbard*,

* The causes which remained untried when the circuits commenced, were tried before *Michaelmas* term, in the *King's Bench*.

the

the Defendant, had sold and assigned the whole of the ship; and so had converted the third to his own use.

The Plaintiff called a Mr. *Brown*, who had purchased it. He was told, That he was not bound to produce the bill of sale from *Hubbard* to him: he nevertheless consented to do it. It was produced.

It was then objected: That the subscribing witness should be called. It was admitted to be necessary; and he was called, and proved it.

Brown was then called back by the Defendant's counsel; and he was asked, If he had not another deed respecting the vessel delivered to him by *Hubbard*, at the time of the execution of the bill?

He answered, That he had.

The counsel was then proceeding to ask him to the effect of it.

It was objected: That this could not be done without calling the subscribing witness to that deed.

It was answered, That this being all one transaction, and the delivery of the deeds having taken place at the same time, that, by the proof of one deed called for by the Plaintiff, all the accompanying instruments were thereby made evidence.

LORD ELLENBOROUGH said, That it was certainly competent for the counsel for the Defendant, by his cross-examination, to enquire, whether there was any such deed; but that he could not avail himself of it in evidence: he should prove the deed in the usual way.

The

The Defendant was not prepared to prove the deed ; and it was not given in evidence.

Erskine, Gibbs, and Hall for the Plaintiff.

Garrow, Giles, and Abbott for the Defendant.

In Trinity term following, the case came on to be argued, when the court decided, That the bill of sale was not absolutely void ; but as to the objects of the trust, which were prohibited by law, the execution of which trusts could not be enforced ; but that there was no such illegality affecting the trustee himself, as would prevent the property from vesting in him in the first instance ; so that he could maintain the action. 3 *East*, 129.

CRAWFORD and others v. STIRLING. Nov. 2, 1802.

ASSUMPSIT for goods sold and delivered.

Pleas, *non assumpsit* and set-off.

The question in the case was, Whether the Defendant was entitled to a set-off, under the following circumstances : — *Crawford* and Co. the Plaintiffs, were manufacturers and merchants, at *Glasgow*, in *Scotland* ; but *Andrew Mitchell*, one of the partners, resided in *London* ; and conducted the business of the house there. One *Kirkpatrick*, who lived in *Liverpool*, having occasion for goods in the course of his trade, in which the Defendant dealt, procured the guarantee of *Mitchell* to the Defendant,

A guarantee to the amount of a certain sum of money, given for a third person, cannot be set off.

Defendant, on account of the house of the Plaintiffs ; for which that house received an allowance of two and a half *per cent*.

Kirkpatrick obtained goods to the amount of 1700*l*. and then became a bankrupt. *Andrew Mitchell* (on account of the house of *Crawford* and Co) and the Defendant afterwards settled an account, in which 1000*l*. which the Defendant admitted should be taken as the amount of the guarantee, was put on the credit side of the Defendant's account ; and balance was struck on the account so stated.

One of the *items* of the set-off, was of the sum which was the amount of the guarantee given by the Plaintiffs to the Defendant, for the goods furnished to *Kirkpatrick*.

It was objected : That this was a species of demand that could not be made the object of a set-off, it not being a debt ; but a demand for unliquidated damages, depending upon the default of *Kirkpatrick*. Secondly, That it arose under a guarantee given by one partner, in the partnership name ; which could not be done, as being out of the course of their trade.

It was answered for the Defendant, as to the first part, That, by the settlement of the accounts between *Mitchell* and the Defendant, in which a certain sum was stated, and admitted on one side of the account, it became a certain and liquidated sum, which might be object of a set-off. As to the second point, That the house of the Plaintiffs were bound, by the agreement of their partners, to the guarantee, they receiving a benefit of two and a half *per cent*.

Lord

Lord ELLENBOROUGH said, He thought there was no foundation for the set-off claimed, as the sum claimed was unliquidated damages: That a guarantee was a contract of indemnity; it was to make good the default of another party, for whom the guarantee was given: That was not an absolute debt by the Plaintiff to the Defendant, but an engagement for the deficiency of *Kirkpatrick* only; it could therefore only be known to what extent the Plaintiff was liable, when it was ascertained how much was paid by *Kirkpatrick's* estate. This was therefore uncertain and unliquidated, till that fact was known. With respect to the settlement of the accounts, in which a certain sum had been put on one side of the account, on account of the guarantee, that was only stated as the amount of the guarantee, and the possible amount in the account; but it was still liable to be altered by the dividend made by *Kirkpatrick*, in diminution of the debt due by him to the Defendant. To make the sum admissible as a set-off, the sum must be settled in monies numbered, which was not the case here; and was therefore inadmissible. — As to the second point, A guarantee given by one partner, in the partnership's name, unless it was in the regular line of business, could not bind the other partners; but if they afterwards adopted it, and acted on it, it should bind them.

Verdict for the Plaintiff.

Garrow and *Taddy* for the Plaintiff.

Erskine and *Wulton* for the Defendant.

Nov. 2, 1802.

CHATERS v. BELL and others.

When there are several indorsers of a bill, the Plaintiff may declare on an indorsement by the payee to his immediate indorser, without stating the immediate ones.

THIS was an action of assumpsit by the Plaintiff, as indorsee against the indorser, to recover the amount of a bill of exchange stated in the declaration to be drawn payable to *Curry*, or order; by him indorsed to the Defendant; and by the Defendant to the Plaintiff.

There were several intermediate indorsers between *Curry* and the Defendant; but those indorsements were not stated in the declaration.

Gibbs objected, for the Defendant: That the Plaintiff could not recover: That though the Plaintiff might declare as immediate indorsee of *Curry* the payee, as on a direct indorsement to himself, he could not take out what indorsements he pleased, and state some and omit others; but was bound in declaring, as indorsee, against a preceding indorser: if he stated any indorsement of the payee, except to himself, to state all the indorsers down to the Defendant, as by such means only he brought down a regular title to himself through the last indorser, and thereby render him liable.

Erskine contended, That it was unnecessary: That it was sufficient for the Plaintiff to state his title as indorsee; and as the action was against the indorser, founded on an indorsement to him by the Defendant, it was only necessary to state the indorsement by the Defendant to the Plaintiff; and the other indorsements might be considered, as to that

that part, a surplufage, except that of the payee, which it was necessary to prove, in order to shew that the bill had been put into circulation.

LORD ELLENBOROUGH over-ruled the objection, faying, That he thought the Plaintiff might declare as he had done; but as the case was to be reserved on another part, he would reserve this *.

Erskine and *Courthope* for the Plaintiff.

Gibbs for the Defendant.

* This point was afterwards abandoned by Mr. *Gibbs*; when the other matter reserved came to be argued.

C A S E S
 ARGUED AND RULED
 AT NISI PRIUS,
 IN THE
 KING'S BENCH,
 MICHAELMAS TERM, 43 GEO. III.

FIRST SITTINGS IN TERM AT GUILDHALL.

COLLETT v. LORD KEITH.

The examination of a person taken in short-hand when examined as a witness, is evidence against him in an action, though he was stopped in giving his testimony, and might have added to, or explained what he had said.

TRESPASS for taking the Plaintiff's ship.

The Defendant had been examined as a witness at the trial of a cause of *Wilson v. Marryatt*. In the course of his examination, he had admitted the taking of the ship in question.

His examination had been taken by a short hand-writer, who had been employed to take down the trial. He was called, and examined as to what Lord *Keith* had said in giving his testimony; and which he had so taken down at the trial.

Garrow, for the Defendant, objected to its being read. He stated, That when Lord *Keith* gave his testimony respecting the taking of the ship, and was proceeding to state his reason for so doing, Lord *KENYON* had interrupted him, and said, "Lord *Keith* need enter into no defence to vindicate his conduct;

conduct, — all the world will agree with him." He stated, That in consequence of that, the question stood sole and unexplained. He said, That the evidence of every witness who was called, ought to be free, voluntary, and with full information of the effect which his testimony might have against himself: That Lord *Keith* was not apprized of the drift of the examination, or the effect which what he said might have against himself: he was therefore entrapped into this evidence, which he should have been permitted to have added to, or explained.

LE BLANC, Justice, said, He was of opinion that it was admissible: That the manner in which it had been obtained might be matter of observation to make to the jury; but if what was said bore in any way on the issue, he was bound to receive it as evidence of the fact itself.

Erskine, Gibbs, and Giles for the Plaintiff.

Garrow, Adam, and Park for the Defendant.

AT GUILDHALL,
SITTING-DAY AFTER TERM.

RAMBERT v. COHEN.

Nov. 30.

ASSUMPSIT for work and labour as a carpenter.

Plea of the General Issue.

The Plaintiff proved the work done; and the charges to be fair and reasonable.

The Defendant's case was, That the Plaintiff had undertaken to do the work at a lower rate than he

Where a receipt for money has been given on unstamped paper, it may be used by a witness who saw it given, to refresh his memory.

had charged by the bill, on which the action was brought; and that the Defendant had paid the whole of the demand according to the price for which he had agreed.

The Defendant's son was called as a witness: he said, That the Defendant had paid to the Plaintiff a sum of money for the work; which he believed was 8*l.* 2*s.* 6*d.*: that a receipt had been given for it by the Plaintiff, which he saw given; but it was on an unstamped piece of paper.

Garrow, for the Defendant, proposed to put the receipt into the witness's hand, for the purpose of using the piece of paper on which the receipt was written, as a memorandum to assist his memory.

Park, for the Plaintiff, objected to it, as it would tend to defeat the stamp duties: That, by giving a receipt on unstamped paper, the party would have, by this means, the effect of its being stamped; besides which, it was giving that in evidence by parol, of which there was evidence in writing.

Lord ELLENBOROUGH said, That as the only matter in dispute was the naked fact of payment of the money, he rather thought the witness might be allowed so to refresh his memory. The paper produced, was not produced as evidence of itself; but it was a material memorandum, which the witness might refer to, and give parol evidence of the fact of payment; which he might do, though a receipt had been so given.

Verdict for the Plaintiff.

Park and *'Esplanasse* for the Plaintiff.

Garrow for the Defendant.

SITTINGS

SITTINGS AFTER TERM
AT WESTMINSTER.

MOLTON v. ROGERS.

Nov. 30.

THIS was an action of debt, on the stat. 25 Geo.III. c. 50. sect. 15, brought to recover the penalty for not producing the certificate entitling the party to kill game, as required by that statute.

It is by that statute enacted, " That if any person shall be found using a dog, gun, &c. or other engine, for the destruction of game, by any other person who has obtained a certificate, it shall be lawful for any person producing such certificate as is required by the act, to demand and require the person so using such gun, to produce and shew the certificate issued to him for the purpose aforesaid; and every such person shall, upon such demand or requisition, produce such certificate to the person demanding the same; and permit the same to be inspected accordingly: and if any such person shall wilfully refuse to produce or shew his certificate, or not having produced or shewn it, shall refuse, on demand thereof, to give his christian and surname, and place of his residence; or shall give any false or fictitious name or residence, he shall forfeit ten pounds."

The penalty under the game certificate act, for not producing a licence when lawfully required, is not complete by the refusal to produce it, unless the party refuses, on request, to tell his christian and surname, and the place of his residence.

The evidence was, That a gentleman of the name of *Slater*, who was a qualified person, was out

Q3

sporting

sporting with two greyhounds : That he was joined by *Rogers*, the Defendant, whose father was qualified : That *Rogers*, when he came into the field and joined him, had with him a greyhound which belonged to his father : That the dog of *Rogers*, and one of *Slater's*, found and killed a hare : That *Slater* had sent and borrowed the dog of the Defendant's father, in order to try him.

Erskine contended, That by the presence of *Slater*, and hunting in his company, the Defendant *Rogers*, though unqualified, was protected : That the law put that trust into a person qualified, that he would not abuse his qualification ; and therefore, while he was following that which the law allowed, the mere joining of an unqualified person, and partaking of the sport, was no offence by such person.

Erskine further contended, That the mere act of not producing the certificate, was not of itself an offence : That by the words of the act, the penalty did not attach until the person who refused to produce the certificate, had also refused to tell his christian and surname, and the place of his residence.

Garrow, for the Plaintiff, relied, That the offences were distinct : the one for not producing his certificate ; the other for not telling his name, &c.

Lord ELLENBOROUGH read the words of the statute : — “ If any such person shall wilfully refuse to produce and shew a certificate, or not having produced and shewn such certificate, shall refuse, on demand, to give his christian and surname,

name, and place of residence, every such person so offending, shall forfeit a sum of fifty pounds."

His Lordship then said, That the offences were not distinct; but that after a refusal to produce the certificate, it was necessary to ask for the party's surname and christian name, and his place of abode; the act intending that to be the medium of discovery of the person sporting without a certificate. Every man was not to be considered as using a dog, who merely participated in the sport: if that was so, no man, unless he was qualified, could join in the sport of the field, nor bring a servant with him; he must be himself a principal, such as the owner of the dogs. The question therefore was, Was this a loan of the dog to the qualified person; and was the Defendant only partaking of the sport? If it was so, though the dog might be his, he was not liable to a penalty. His Lordship then added, I am fortified in this construction of the act, by observing, That by the act, only 20*l.* is given for not taking out a certificate; whereas the penalty, as it is contended for, for not producing a certificate when demanded, is 50*l.* A man who has not a certificate, and who of course cannot produce one, would be subjected to a penalty of 50*l.* though the not taking it out, subjects him only to 20*l.*; which seems to be absurd.

An unqualified and unlicensed person may join in the sport with a person lawfully entitled to kill game, if he merely joins in the sport, and is not himself a principal, or using his own dogs.

Verdict for the Defendant.

Garrow and Smith for the Plaintiff.

Erskine and Wigley for the Defendant.

HARRISON v. STRATTON.

In an action for slanderous words, imputing dishonesty to the Plaintiff, the declaration is not supported by proving words which may import such a meaning, but are equivocal, and may have a different import.

THIS was an action for slanderous words.

Plea of Not Guilty.

The Plaintiff was a surveyor; and the Defendant a tinman and brazier.

The Defendant had set up a hot kitchen, with the other apparatus, for a Mr. *Angerstein*; for which he had charged 90*l.* The payment had been disputed, as being a considerable overcharge. The Defendant brought an action to recover the amount; and the cause was tried at *Guildhall*.

Harrison, the present Plaintiff, had been employed by Mr. *Angerstein* as a surveyor, to estimate the value, in order to ascertain how much ought to be paid; and to give evidence at the trial, as a witness, of the value he put on the work; which was 60*l.* The cause was tried; and the Plaintiff was examined as a witness, on behalf of Mr. *Angerstein*. The Defendant recovered 90*l.* being the whole of his demand.

The Defendant afterwards, speaking of *Harrison*, said, “*Harrison* is a scoundrel. If I would have found him an oven for nothing, and had given him after the rate of 20*l. per cent.* upon the amount of the charges for the work and materials, he would have passed my account.”

These were the words laid in the declaration, as imputing dishonesty in the Plaintiff in the course of his business and profession as a surveyor.

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The first witness called for the Plaintiff, proved the words, "*Harrison* is a scoundrel; and if I had *allowed 20l. per cent.* he would have passed my account." The second witness proved the words, "*Harrison* is a scoundrel; and if I had *deducted 20l. per cent.* he would have passed my account." These were the only witnesses called by the Plaintiff.

Upon those words being so proved, Lord ELLENBOROUGH said, He thought the Plaintiff must be called. He said, That on the face of the record, the words seemed to him to be scarcely actionable; they imputed rather an inclination to the Plaintiff to do that which was wrong, than the actual doing of it; and that imputing evil inclinations to a man, which were never brought into action, was not actionable. Words to be actionable should be unequivocally so, and be proved as laid; but that as the words were proved, they did not support the declaration. The words of the declaration were, "If he would give me *20l. per cent.*;" that might mean something to himself, by which he would be himself benefited, to the prejudice of his employer; but the words proved were, "If he would *allow*, or if he would *deduct 20l. per cent.*" These words might import an allowance or deduction from the Plaintiff's bill, for the benefit of his employer; and were of a different meaning and import.

The Plaintiff was nonsuited.

Garrow and *Jervis* for the Plaintiff.

Erskine for the Defendant.

WILLIAMS v. WALSBY.

A general authority from one of several assignees of a bankrupt's estate to the others to act for him, and use his name, is not sufficient to enable the others to execute a release by deed; there must be a special authority for that purpose.

THIS was an action brought by the Plaintiff, who was a joint surety with the Defendant, for one *Oliver Toulmin*, a bankrupt, to recover a contribution for money paid on his account; and for which the Defendant had given a bond of indemnity.

The Defendant's plea, among others, was this: That one of the assignees of *Toulmin*, with the consent of the others, had released, &c.

There were three assignees of *Toulmin*'s estate.

The Defendant was about to give parol evidence of the fact; when it was objected by the Plaintiff's counsel: That as the Defendant claimed a discharge by deed from one of the assignees, that such could not be done by that evidence, as one assignee could not, by deed, bind another, without an authority in writing, under seal; and *Harrison v. Jackson*, 7 Term Rep. 207, was cited.

Lord ELLENBOROUGH said, That he thought the evidence was admissible as offered; as perhaps it might have been done by one in the presence and with the concurrence of the others.

The counsel for the Defendant cited *Ball v. Dunsterville*, 4 Term Rep. 313; and Sir *W. Jones*, 268.

The release was then produced, and the subscribing witness to it called. He proved the execution of it by a Mr. *Urquhart*, one of the assignees, in the presence and with the assent of a Mr. *R. Toulmin*, another of the assignees; but he said, That

he

he had never seen, nor had any communication with the third assignee.

Mr. *R. Toulmin* was then called, who said, That he had consented to the giving of the release. Being asked, If he had ever communicated with the third assignee on the business? he said, That that assignee had given to *Urquhart* and him a general authority to act for him, as that assignee resided in the country, and could not attend to the concerns of the estate.

Upon this evidence Lord ELLENBOROUGH said, That it was not sufficient to support the release: That there should have been a special authority from the third assignee to execute the deed; and that the general authority given by him to the other assignees to act for him, did not warrant what had here been done.

Verdict for the Plaintiff.

Gibbs, Wood, and Wigley for the Plaintiff.

Erskine and Burrough for the Defendant.

CAMFIELD v. GILBERT.

ASSUMPSIT for money had and received, with the other common money counts.

Plea of *non-assumpsit*.

The action was brought to recover the sum of 50*l.* which was the deposit paid by the Plaintiff, on the purchase of an estate in *Kent*, contracted to

In an action for money had and received, to recover back a deposit on a sale, on the ground of a defect of title, the party bringing the action must prove the title bad; and it shall not be sufficient to shew that the title has

been deemed insufficient by conveyancers, who have been employed to advise upon it.

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be sold by the Defendant to the Plaintiff; the Plaintiff contending, That the title was bad; and that he was entitled to recover his deposit.

Gibbs, counsel for the Plaintiff, put it to Lord ELLENBOROUGH, for his opinion as to his right to recover: That opinions of different conveyancers had been taken on the title before the completing of the purchase, who were of opinion, that the title was defective; and ought not to be taken by the Plaintiff: and then asked, Whether it might not be sufficient for him to rely on the fact of such conveyancers advising the party not to complete the purchase? or, Whether it was necessary for him, on the part of the Plaintiff, to go into the title, to shew that it was defective, in order to entitle him to recover the deposit, as paid on a bad and defective title.

LORD ELLENBOROUGH said, The Plaintiff's right to recover the money deposited, depended on the defect of the title of the Defendant to the premises, which he had contracted to sell; and unless it was a bad title, he had no claim to recover. It would be therefore necessary for him to shew that the title was bad: this being doubtful, in point of law, the facts were upon a case as to that reserved *.

* This case came on to be argued in the Easter Term following, when the Court decided, That the Defendant had a good title to the premises; and he had judgment accordingly. Vide 3 *East's Rep.* *East*, 43 *Geo.* III.

Gibbs then stated, That the action was for money had and received, and money paid, &c. : That, independent of the deposit, considerable sums had been expended by the Plaintiff in taking the opinion of conveyancers, and investigating the title; which sums he contended he was entitled to recover; and to be added to the verdict for the deposit, under the count for money paid, &c.

Under the general count for money paid, the buyer of a property shall not recover the expenses of investigating the title, if it afterwards turns out to be bad.

Lord ELLENBOROUGH said, He thought that that could not be called money paid, laid out, and expended to the Defendant's use, which the Plaintiff had expended for his own satisfaction, as to the title which he was about to take; but that, at all events, if any thing could be so recovered, it should be on a special count, and framed according to the fact. Whether this could be so framed he would not say; but that on the general count for money paid, the Plaintiff could not recover it.

This was also reserved.

Gibbs and *Wigley* for the Plaintiff.

Erskine, *Garrow*, and *Espinasse* for the Defendant.

In the course of his cross-examination by the counsel for the Defendant, he was asked, If he had not been in the House of Correction, in *Sussex*?

LORD ELLENBOROUGH interposed, and said, That that question should not be asked: That it had been formerly settled by the Judges, among whom were Chief Justice TREBY and Mr. Justice POWELL, both very great lawyers, that a witness was not bound to answer any question, the object of which was to degrade, or render him infamous. His Lordship said, That he thought the rule ought to be adhered to, as it would be an injury to the administration of justice, if persons, who came to do their duty to the public, might be subjected to improper investigation.

The witness was not permitted to be examined.

The Defendants were acquitted.

Garrow and ——— for the Plaintiff.

Erskine, Knapp, and Watson for the Defendants.

SITTINGS AFTER TERM AT GUILDHALL.

LEACH v. BUCHANAN.

If a party on a bill, on being asked, if it is his own hand-writing, answers, That it is, and will be duly paid, he cannot afterwards set up a defence of forgery of his name; for he has accredited the bill, and induced another to take it.

ASSUMPSIT on a bill of exchange for 200*l.* drawn by one *James McConnell*, in his own favour, on the Defendant; and accepted by him. *McConnell* indorsed it to *Mawley*; and he indorsed it to the Plaintiff.

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The Plaintiff proved the hand-writing of *M^cConnell* the drawer, and of the indorsers. The evidence, as to the acceptance, was by a witness, who stated, That the Plaintiff, before he took the bill, not having a very perfect knowledge of the Defendant's hand-writing, had sent the witness with the bill to him, to ask him if the acceptance was his hand-writing. The witness asked him if it was so : when he answered, It was ; and that it would be duly paid.

Another witness proved to the same effect.

It was stated by *Garrow*, of counsel for the Defendant, as his defence, That the bill was a forgery by *M^cConnell*, who was at that time in prison under a charge of a similar nature : That he was prepared to go into evidence to establish the fact, that the hand-writing was not the Defendant's.

Lord ELLENBOROUGH said, That if the counsel wished to go into the evidence he had stated, he would admit it, as public justice might require an example to be made ; but that after the evidence which had been given by the Plaintiff respecting the acceptance, unless it was totally discredited, it could not entitle the Defendant to a verdict. The case, as it then stood, did not rest on the acceptance being a forgery, or not. It might not be the Defendant's hand-writing ; and he might prove that it was not so by witnesses ; and still the Plaintiff be entitled to recover : for before the Plaintiff took it, he sent the bill to the Defendant ; and upon the bill being offered to him, and being asked if the acceptance was not his, he answered in the affirmative, That it was. If he

so accredited the bill, and induced a person to take it, he should hold him liable for the payment of it.

Verdict for the Plaintiff.

Erskine and *'Espinasse* for the Plaintiff.

Garrow for the Defendant.

HENRY v. ADEY.

In an action on a foreign judgment, it is not sufficient to prove the hand-writing of the Judge subscribed to the judgment; the seal of the colony abroad must be proved.

ASSUMPSIT for money had and received, with the common money counts.

The action was brought to recover the amount of a judgment obtained by the Plaintiff against the Defendant, in the island of *Grenada*, in the *West Indies*.

To prove their case, the Plaintiff's counsel produced a paper, which they stated to be a copy of the judgment obtained in the *West Indies*: it was under seal, and signed by the Chief Justice of the island; and then proposed to give it in evidence, upon proving the hand-writing of the Judge.

It was objected: That that evidence would be insufficient without proof of the seal: That the instrument derived all its validity from its being an authenticated instrument, under the seal of the island; without which, it was not such an instrument as could be received as of itself sufficient to establish a debt.

It was answered by the Plaintiff's counsel, That proving the hand-writing of the Judge, had the effect

effect of authenticating the seal; but that it was of itself sufficient evidence of a judgment in that court, of which the Judge's name was to it.

Lord ELLENBOROUGH ruled, That as the instrument derived its authenticity from the seal, it was necessary to prove that the seal was the seal of the island; and that proof of the Judge's handwriting was not sufficient.

The Plaintiff was nonsuited.

Gibbs and Scarlett for the Plaintiff.

Erskine for the Defendant.

SECOND SITTINGS AFTER TERM IN THE KING'S BENCH.

DAVEY v. CHAMBERLAIN and another.

December 13th.

THIS was an action on the case, for negligently driving a chaise, by which the Plaintiff's horse was killed.

Plea of Not Guilty by both Defendants.

The accident was proved to have taken place on the road to *Wandsworth*, by a one-horse chaise (in which both Defendants were then riding; and which, at the time of the accident, was on the wrong side of the road) being driven against the Plaintiff's horse, by which he was killed.

The two Defendants were proved to have been together in the chaise when the accident happened;

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but

In an action against two, for negligently driving a chaise, if the two Defendants have hired it jointly, and were jointly in the possession of it, both are liable for the accident. *Aliter*, If it belonged to one only, and the other was merely a passenger.

but *Chamberlain*, one of the Defendants, was sitting in the chaise smoking; and it was driven by the other.

Erskine, for the Defendant, put it to Lord ELLENBOROUGH, Whether he was not entitled to have a verdict taken for *Chamberlain*, professing his view to be, that he might use his testimony in favour of the other Defendant.

The ground of this application was, That no verdict ought to pass against *Chamberlain*, the injury having proceeded from the ignorance or unskilfulness of the other Defendant, who was the person driving the chaise, and in whose care and under whose management it then was, — and not by the means of a person who was perfectly passive, and who took no part in the management and direction of the horse.

Lord ELLENBOROUGH said, That if a person, driving his own carriage, took in another person into it as a passenger, such person could not be subjected to an action, in case of any misconduct in the driving by the proprietor of the carriage, as he had no care nor concern with the carriage; but if two persons were jointly concerned in the carriage, as if both had hired it together, he thought the care of the King's subjects required, that both should be answerable for any accident arising from the misconduct of either in the driving of the carriage, while it was so in their joint care.

The fact turned out to be, That the chaise in question had been hired by both the Defendants; and a verdict passed against both accordingly.

Garrow and *Lawes* for the Plaintiff.

Erskine and *Gibbs* for the Defendants.

COARE v. GIBLET.

THIS was an action of debt on a bond, conditioned for securing the payment of an annuity.

The annuity was a joint one of the Defendant's, one *Daniel Smith*, and four other persons mentioned in the condition.

There were several pleas and issues thereon. The fourth was, That the said sum of 1400*l.* in the condition of the written obligation mentioned and alledged to have been paid by the Plaintiff to the use of the several parties (grantors of the annuity, as stated in the memorial) was not paid by the said Plaintiff to and for the use of the said six persons.

The memorial stated a bond on the 24th of *December*, 1796, which recited the grant of an annuity for the sum of 1400*l.* which was that day paid by the Plaintiff to one *Daniel Smith*, to and for the use of the grantors, six in number.

The bond was dated the 24th of *December*. On that day, *Coare*, *Daniel Smith*, and the witness, went to the bankers of *Coare*. *Coare* got 1400*l.* in notes; and gave them to *Daniel Smith*, in payment of the consideration of the annuity. *Smith* then placed the money in the same bankers hands, in the name of himself and *Lowe* (*Coare's* attorney) until the deeds were executed. This was in pursuance of an agreement, as the other parties had not executed.

When the grantee of an annuity pays the purchase money on a particular day into a banker's hands, in the joint names of his attorney and the grantor, to be paid over to the grantor on the execution of a particular deed, and it is done at a subsequent day, the memorial properly states the payment as made on the latter day.

An accountable receipt was taken in the joint names of *Daniel Smith* and *Lowe*, in the following words: — “ Received, the 24th day of *December*, 1796, of Mr. *Daniel Smith* and Mr. *John Lowe*, one thousand four hundred pounds on account, to account for on demand.”

(Signed by the bankers.)

The Defendant, who had not executed before, executed the bond on the following day, the 25th; and on the 26th of *December*, all the deeds being then completed and executed by all the parties, *Lowe* (*Coare's* attorney) went with *Daniel Smith* to the bankers where the money had been paid in, when *Daniel Smith* received the whole of the 1400*l.* and gave up the receipt.

It was objected by the Defendant's counsel: That this issue should be found for the Defendant: That the annuity act required, in the most express terms, the name of the person by whom the money was paid to be set out: That the issue was, that the money was paid by *Coare*; whereas he had made the payment on the 24th, by his draft on his banker; and the actual payment was not made till the 26th, when it was made, not by *Coare*, but by *Lowe*, his attorney.

It was answered, That, on the 24th, the Plaintiff had parted with all dominion over his money; and having from that time no controul over it, it was in fact a payment by himself on that day.

LORD ELLENBOROUGH said, As to the issue of Whether there was a payment on the 26th to *Daniel Smith*, to the use of himself and the
other

other grantees, I am of opinion, that the conditional payment, made on the 24th of *December*, being then absolute, and that being to *Daniel Smith*, for his own use and that of the others, I think that it must be deemed a payment on that day, in the terms of the issue.

It was strongly urged by *Gibbs*, that to make this a payment by the Plaintiff within the annuity act, it was essential, under the determinations which had taken place, that he should be present; whereas all that took place on this *Monday*, was Mr. *Lowe*, the attorney for *Coare*, indorsing, on the bankers accountable receipt, an order to pay the money to *Daniel Smith*.

LORD ELLENBOROUGH said, That he must look to the issue as it stood on the record; and he was of the opinion he had just delivered; but would take a note of it, if Mr. *Gibbs* chose to move it.

Park and *Holroyd* for the Plaintiff.

Erskine, *Garrow*, and *Reader* for the Defendant;

Vide 3 *Easf's* Rep.

ROBSON and another, Assignees of BLAKEY, v. KEMP and another.

ASSUMPSIT by the assignees of *Blakey*, a bankrupt, for money had and received by the Defendant, subsequent to an act of bankruptcy committed by him.

This money was the produce of a cargo of coals,

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which

The declarations of a bankrupt as to any particular matter or deed which may constitute an act of bankruptcy, if made after the deed done, are not evidence.

which had been sold by and paid over to the Defendant as factor, by the purchaser. The Plaintiff attempted to prove an act of bankruptcy committed on the 12th of *October*, 1801.

The act of bankruptcy relied on was, The execution of a fraudulent assignment, by deed, of a ship, by the bankrupt to his son.

A witness was called to give evidence of a conversation between the father and his son respecting the transaction, in order to prove the fraud; but it appeared to have taken place after the execution of the deed.

This was objected to: That the fraudulent assignment by deed being an act of bankruptcy, it was making the declarations of the bankrupt himself evidence to establish an act of bankruptcy, by proving the deed fraudulent.

LORD ELLENBOROUGH said, Where the declaration of the bankrupt is part of the *res gesta*, though it may shew the intention of the act, and thereby constitute an act of bankruptcy, it may be evidence (as is the common case of a bankrupt going out of the way to avoid an arrest, in which his declarations, as to the view with which he absented himself, are certainly evidence); so, if the declarations of the bankrupt have been before the act, they may shew with what intention it was done; and it would be evidence. But declarations and conversations taking place subsequent to the execution of the deed and the commission of the act, which constitute an act of bankruptcy, I think are not admissible.

To.

To prove that the assignment from the father to the son was fraudulent, it was suggested, That the nominal consideration for the purchase of the ship, which was 3000*l.* was not paid, but was merely a colourable consideration; and for that reason, fraudulent: and it was proposed to prove that such was the case, by shewing that the son had executed a security back to the father for 2250*l.* part of the nominal consideration supposed to be paid by him to the father.

To prove this, Mr. *Ashfield*, an attorney, was called: he stated, That he was attorney for both father and son; and that they had employed him to prepare a deed from the father to the son; and to see it executed.

His testimony (on his own suggestion) was objected to by the Defendants counsel, as being a communication from his clients to him; and which ought not to be disclosed.

It was answered, That he was attorney for *Blakey*, the father, whose assignees were the Plaintiffs; and that they had a right to examine him as to it.

Per Lord ELLENBOROUGH. He is also attorney for the younger *Blakey*, whose interests are to be affected by the evidence. I do not think he is bound to disclose any matter of which he has so obtained knowledge, in the character of attorney, by reason of the communication which took place between his client and another person, though that person also employed him as his attorney, *pro hac vice*; but the evidence of the deed itself stands on a different footing. An attorney, from his situation,

An attorney employed by consent of two parties in preparing a deed from one to the other, cannot be examined as to what he so became informed of in the preparing the deed, when the action is brought by the assignees of one against the other, suggesting fraud in the deed.

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is bound to prove the execution of a deed ; that is, a fact no way connected with any information obtained in his character of attorney. I therefore think he may be examined as to that fact ; and also as to the contents of the deed itself, in case it has been lost.

He was accordingly examined to that effect.

The cargo in question was proved to have come to the Defendant's possession in the character of factor, on the 21st of *October*, 1801 ; and to have been sold on the 26th. The money was not received till some time afterwards. It was admitted, That an unequivocal act of bankruptcy was committed on the 26th of *October*. The Plaintiff's counsel contended, That the money being received subsequent to that period, they had a right to recover it back. It was admitted that a sum, exceeding the value of the cargo, was due to the Defendant.

LORD ELLENBOROUGH said, He thought the Defendant became lawfully possessed of the coals on the 21st, before there was any act of bankruptcy committed : he was in the course of disposing of them when *Blakey* became a bankrupt ; and he had a right to proceed with the sale, to receive the money, and to hold it in payment of his own balance.

Verdict for the Defendants ; *Gibbs* desiring his Lordship to reserve the two first points.

Gibbs, *Marryatt*, and *Giles* for the Plaintiffs.

Erskine, *Park*, and *Cassels* for the Defendants.

SITTINGS

SITTINGS AFTER TERM
IN THE COMMON PLEAS
AT WESTMINSTER.

BROMLEY v. WALLACE.

December 4th.

THIS was an action for criminal conversation with the Plaintiff's wife.

Plea of Not Guilty.

The Plaintiff and Defendant were both surgeons in the navy. The Plaintiff proved his marriage, and the seduction of his wife; and there rested his case.

Lens, Serjt. for the Defendant, stated his defence to be, That the Plaintiff had so conducted himself towards his wife, that he was not entitled to any damages, or perhaps to be nonsuited: That the action was founded on the injury which the Plaintiff sustained from the loss of the society and comfort of his wife: That here the Plaintiff had sustained no such loss, as he had shewn the greatest indifference and want of affection to her: That, in proof of this, he should shew, that while she lay dangerously ill at *Yarmouth* for five weeks, and the ship to which he belonged lay in *Yarmouth Roads*, he landed almost daily from the ship, and was at the door where his wife was then confined, without visiting her, or shewing any manner of concern, anxiety, or regard for her: That during the same time he contracted the venereal distemper; and lastly, That during his wife's illness, he had

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The misconduct, neglect, or infidelity of the husband cannot be set up as a defence for the infidelity of the wife, in an action for criminal conversation.

misconducted himself with the maid-servant of his family: Of these facts he gave some evidence; but not to the extent stated in his opening.

Lord ALVANLEY, in summing up to the jury, said, That what the Defendant's counsel had stated, went to the damages only: That he was aware, the late Lord KENYON had laid down a different doctrine; and had held that such evidence went to the ground of the action itself: he thought differently. He was of opinion, that the infidelity or misconduct of the husband could never be set up as a legal defence to the adultery of the wife: that alone which struck him as furnishing any defence was, where the husband was accessary to his own dishonour; he could not then complain of an injury which he had brought on himself, and had consented to; but that the wife had been injured by the husband's misconduct, could not warrant her in injuring him in that way, which was the keenest of all injuries. He therefore directed the jury to consider the evidence as going in mitigation of the damages only, and not as furnishing an answer to the action, or as entitling the Defendant to a verdict.

Verdict 200*l.* damages.

Shepherd, Serjt. and *Marryatt* for the Plaintiff.

Lens, Serjt. and ——— for the Defendant.

Vide *Wyndham v. ux Wycombe*, ante vol. iv. — and the case of *Strutt v. the Marquis of Blandford*, there cited.

SITTINGS AFTER TERM AT GUILDHALL,
IN THE COMMON PLEAS.

MANNERS *q. t. v.* POSTAN.

THIS was an action of debt, on the statute of 12th *Ann*, for the penalties under that statute, for taking usurious interest.

Plea of the general issue.

In all the counts, the usury was laid, "That the Defendant took and accepted from one *Richard Lowe* the sum of 5*l.* for forbearing and giving day of payment for 50*l.* lent by the Defendant to the said *Richard Lowe*, from the 15th of *April* to the 5th of *August*, which exceeded," &c.

The case in evidence was, That the Plaintiff being indebted to one *Dance* in 111*l.* gave his warrant of attorney for it; and *Lowe*, as a collateral security, gave his note for that sum, payable to *Dance*; that *Dance* indorsed this bill to the Defendant; so that there was no debt due from *Lowe* to the Plaintiff, but by reason of the note so indorsed to the Defendant, on which *Lowe's* name appeared as the maker.

This note became due on the 15th of *April*. On the 13th, *Lowe* came to the Defendant's son, who was his attorney, to ask time for payment. It was agreed, that 61*l.* should be then paid; and a warrant of attorney given for the remainder. *Lowe* paid down a sum of money on the table, as for the sum

When an instrument, executed in the presence of a subscribing witness, is offered in evidence, whether in chief in the cause against the Defendant, or collaterally, it must be proved by the subscribing witness; nor shall the admission of the execution of it, by the party who executed it, be received.

sum of 61*l.*; executed the warrant of attorney, payable in three months, for the remaining 50*l.*; and went away. After he was gone, it was discovered that he had made a mistake of 5*l.* The Defendant's attorney sent his clerk to *Lowe*, with the money paid, and another warrant of attorney, with orders to return the money to *Lowe*, in case he was unwilling to have the matter settled, by giving another warrant of attorney, rectifying the mistake. When the clerk came to *Lowe*, he stated to him the mistake. *Lowe* at first hesitated; but afterwards agreed to allow it; and that a new warrant of attorney was to be executed for 55*l.* in place of that for 50*l.*

Lowe was the witness by whom the Plaintiff's case was proved; and he stated, That the 5*l.* was an act of extortion done to cover the usury, and a pretext to get the 5*l.* To prove that part of the case, the warrant of attorney for 55*l.* was put into his hand; and he was asked, If he had executed it. It was witnessed by *Gale*, the clerk to *Postan*.

It was objected: That this evidence was inadmissible: That no written instrument should be given in evidence without calling the subscribing witness; or where there was an admission by the party himself, against whom it was produced, that it was his deed.

It was answered, That whatever might be the rule when the action was against the party himself who executed the instrument, it did not hold when the instrument was not the foundation of the action itself; but to be given collaterally in evidence. It was stated, that it had been so ruled at *Nisi Prius*.

Lord ALVANLEY said, That he thought he could

could not admit the warrant of attorney to be used in evidence, unless the subscribing witness was called: That the rule was founded on the principle, that there should be an investigation from the subscribing witness of what took place at the time of the execution of the instrument: That the rule was not, in his opinion, to be confined to cases, when the instrument in question was the ground of the action; but also when it was used in evidence collaterally.

The subscribing witness was called. He proved the facts above stated, in contradiction to the evidence given by *Lowe*.

When the Plaintiff closed his case, the counsel for the Defendant objected: That the Plaintiff should be called: That this being an action for usury, the contract should be accurately stated: That in every count of the declaration, the transaction was laid as money lent by *Posban* the Defendant, to *Lowe*: That there was no loan of money from *Posban*; *Lowe* had only become a security for *Manners's* debt to the Defendant, by reason of the indorsement of *Manners's* note. This therefore was not the contract stated in the declaration.

A count in debt, for usury, stating it to be committed in a loan from *A.* to *B.* is supported by shewing that *B.* was indebted to *A.* as the maker of a note, of which *A.* was the indorsee; and on its becoming due, that *A.* gave further time for the payment of it.

It was answered by the Plaintiff's counsel, That by giving the note for 111*l.* *Lowe* became a debtor to *Posban*: That when, in *April*, it became payable, if the ceremony had been gone through, of *Lowe's* paying the money to *Posban*, and *Posban* had then handed back 50*l.* or 55*l.* to *Lowe*, then it would clearly be a loan: That this transaction was no more than that, as the Defendant had suffered it to remain

in

in his hands, and so was a loan: That as in an action for money lent, this note could be given in evidence, it was to be considered as money lent, and corresponded with the count.

Lord ALVANLEY said, He would reserve that point.

Verdict for the Plaintiff, subjected to the court,

Marshall, Serjt. and *Wigley* for the Plaintiff.

Shepherd, *Best*, Serjts. and *Espinasse* for the Defendant.

This latter point was afterwards made, on a motion for a nonsuit in the Common Pleas; but the court held, that the evidence supported the count, Vide 3 *Bos.* and *Pull.* 343.

MACBRIDE v. MACBRIDE.

How far a witness may be examined as to matters tending to disgrace or degrade him.

THIS was an action of *assumpsit*, to recover several *items* of demand.

To prove part of the demand, a woman was called as a witness.

It was suggested, that she lived in a state of concubinage with the Plaintiff.

Best, Serjt. was proceeding to examine as to that point, when

Lord ALVANLEY interposed, and said, That as evidence to the effect proposed to be gone into had been objected to in another court, he would have

have it understood, how far he would allow such investigation to go. He thought questions as to general conduct might be asked; but not such as went immediately to degrade the witness: he would therefore allow it to be asked, whether she was married, as she might be married to the Plaintiff. But having said that she was not, he would not allow it to be asked, Whether she slept with him? His Lordship then added, I do not go so far as others may: I will not say that a witness shall not be asked to what may tend to disparage him: that would prevent an investigation into the character of the witness, which it may be often of importance to ascertain. I think those questions only should not be asked which have a direct and immediate effect to disgrace or disparage the witness.

Cockell, Serjt. and *Lawes* for the Plaintiff.

Best, Serjt. for the Defendant.

LEEDS v. WRIGHT:

THIS was an action of trover, brought by the Plaintiffs, who were manufacturers at *Manchester*, to recover the value of a quantity of goods, which had come to their hands under the following circumstances:—

In the month of *August* 1802, one *Moisseron* purchased at *Manchester*, as the agent for the house of *Legrand* and Company, of *Paris*, the goods in question; but he was at liberty to send them anywhere to the Continent he thought best for their interest.

Where goods have been ordered by an agent, who has a power of disposing of them as he thinks fit, for his principal's benefit, if they come to his possession, though not to his principals, they cannot be stopped *in transitu*.

The goods were directed at the time of the purchase to be forwarded to the Defendant, who was a packer, employed by *Moifferon*, in *London*, to be packed for exportation. The goods were sent accordingly; and delivered to the Defendant on the 3d of *September*. Immediately on their arrival, *Moifferon* went to the warehouse of the Defendant *Wright*: he examined the goods; some he took, and re-packed the rest, for the purpose of exporting them.

On the 7th of *September*, news came to *Manchester* that the house of *Legrاند* and Co. had stopped payment. Part of the goods then remained in *Wright's* warehouse. The Plaintiff immediately demanded these goods; and having tendered to the Defendant the charges which had accrued on them, and which were refused, brought the present action.

The Plaintiffs counsel grounded their right to recover, on the right to stop the goods *in transitu*; contending, That the sale was to *Legrاند* and Co.; and that, until their getting into their possession, they were *in transitu*; and a right remained in the owners (the Plaintiffs) to stop them. *Ellis v. Hunt*, 3 Term Rep. 467, was cited.

For the Defendant, it was insisted, That their right to stop *in transitu* was divested by the delivery to *Wright* the Defendant, and by the acts of ownership exercised on them by *Moifferon*.

LORD ALVANLEY. The Plaintiffs had no right to stop these goods. The sale was here to *Moifferon*; the contract was with him, and the delivery to his order. He was the agent for the house of
Legrاند

Legrand and Co.; but he had a discretionary power to send them where he pleased. The right to stop *in transitu*, ceases the moment they come into the possession of the buyer, and he exercises any act of ownership on them. It is here in proof, that *Mojferon* unpacked them; and having taken some away, repacked the rest. If that is not exercising the right of an owner, I do not know what is. Can it be said, That he might not have sold them in *London* the moment they arrived? and would not the sale of them have been good?

The Plaintiff must be nonsuited.

Cockell, Serjt. and *Holroyd* for the Plaintiffs.

Best, Serjt. for the Defendant.

END OF MICHAELMAS TERM.

C A S E S
 ARGUED AND RULED
 AT NISI PRIUS,
 IN THE
 KING'S BENCH,
 HILARY TERM, 43 GEO. III.

FIRST SITTINGS IN TERM AT GUILDHALL.

February 3d.

ROBERTSON v. FRENCH.

In an action on a policy of insurance on goods, the supercargo, who was to have had a share in the profits of the adventure, is a good witness, where the goods were lost before they were sold.

THIS was an action of *assumpsit* upon a policy of insurance on goods on board the ship *Chesterfield*, on a voyage from the *Cape of Good Hope* to the *Brazils*.

Loss by confiscation.

Plea of general issue.

To prove the several circumstances of the interest, loss, &c. the Plaintiff called the supercargo as a witness. He was asked, on his *voire dire*, Whether he was not interested in the voyage in question? He answered, That he was to have had one-third of the net profits of the voyage, in case it had been performed; but that he had no other interest whatever.

Gibbs

Gibbs, for the Defendant, then objected: That this was an interest which rendered him incompetent, the policy being on goods, from the sale of which the profits were to arise.

It was answered, That the vessel having been lost before the goods had been sold, and he being only interested in the profits after the sale, there could be no profits where there was no sale; and, of course, he could have no interest in the question.

LORD ELLENBOROUGH said, He was of opinion that the witness was competent. The action was to recover the price of the goods which had been on board. The recovery from the underwriters, of the price of the goods which were lost, and from whence no profit could therefore ever arise, was no matter of interest in the witness. The policy covered no part of the profits; it was on the invoice-price of the goods only which belonged to the Plaintiff, who had shipped them, and to which the witness had no manner of claim.

The Plaintiff recovered.

Erskine, *Garrow*, and *Park* for the Plaintiff.

Gibbs and *Giles* for the Defendant.

 SITTING-DAY AFTER TERM AT WESTMINSTER.

February 14th.

MULLETT v. HULTON.

Where a libellous letter refers to a newspaper, as containing the slanderous matters imputed to the Plaintiff, the Defendant may give the newspaper in evidence, in mitigation of damages, under the General Issue.

THIS was an action on the case, for a libel.

Plea of the General Issue Not Guilty.

The declaration stated, That the Plaintiff, being a person of good fame, &c. and being about to take a house of one *Salter*, — the Defendant, in order to prevent him, and to injure and defame him, addressed a certain letter to *Salter*; and therein said of the Defendant, “ Mr. *Hulton* (the Defendant) cannot for a moment suppose that Mr. *Salter* is acquainted with the newspaper particulars, relative to the party alluded to (meaning the Plaintiff *Mullett*) otherwise, it is not probable Mr. *Salter* would introduce an acknowledged felon, debauchee, and seducer into the neighbourhood of *Angel Row*.”

The Plaintiff proved the letter, in which the slander was written, to be the hand-writing of the Defendant; and there rested his case.

Erskine, for the Defendant, contended, That he was at liberty to go into evidence, that the Plaintiff had been in fact a seducer, not as an answer to the action; but in mitigation of the damages. He admitted, that not having pleaded the truth of the words, he could not prevent a verdict from passing against the Defendant; but that he having referred to newspaper authority for the words used in the letter,

letter, and not having given them as his own; or from his own knowledge, that he should be at liberty to give the fact in evidence as coming from another source, to which he referred in his letter; and as the slander did not proceed from him, it would go in mitigation of damages.

LORD ELLENBOROUGH said, That as the pleading stood on the record, the evidence offered was inadmissible as an answer to the action. The libel was proved; and there was no justification that entitled the Defendant to a verdict; but he added, that as the words referred to a new-paper, and were so written, as a quotation from a newspaper, if the newspaper could be produced, he would admit it as evidence, as having caused the Defendant to adopt what he had written in the letter, he having so referred to it.

It was not produced; and the Plaintiff recovered.

Garrow and Conyn for the Plaintiff.

Erskine and Lawes for the Defendant.

SMITH v. KELBY.

February 13th.

ASSUMPSIT for goods sold and delivered.

Plea of *non-assumpsit*.

The defence was, That when the goods were sold, it had been agreed between the parties, that the Plaintiff was to take the promissory notes of the Defendant, payable at different dates; and that the action was commenced before the time expired, for which he was to have credit under the notes.

A bill of parcels, on which was written, "Settled by one bill at three and another at nine months," is not admissible in evidence, unless it is stamped.

To prove this, the Defendant produced the bill of parcels of the goods sold by the Plaintiff, and delivered by him. At the bottom of this bill was written, "Settled by two bills, — one at three months, and one at nine months." This was not stamped.

Garrow, for the Plaintiff, objected: That the paper offered could not be admitted: That, in fact, it must be taken to be either a receipt, purporting that the goods were paid for by the bills mentioned, and which should therefore have a stamp for receipts; or be taken as an agreement, as to the mode of payment at a future time, which equally required a stamp.

Lord ELLENBOROUGH said, That the paper produced did require a stamp. He considered it as settling the mode of payment between the parties by two bills; which, when paid, would be a discharge of the debt. As it therefore was not the common case of goods sold and delivered, and for which, on delivery, or according to the settled usage or agreed mode of credit, payment was to be made, but which were to be paid for in a particular way, founded on an agreement between the parties; and as the paper produced was therefore offered in evidence of an agreement to that effect, it came within the words of the statute, and required a stamp.

Verdict for the Plaintiff.

Garrow and *Wingfield* for the Plaintiff.

Erskine and *Lawes* for the Defendant.

SITTING-

SITTING-DAY AFTER TERM.
IN THE COURT OF KING'S BENCH,
AT GUILDHALL.

MERTENS v. ADcock.

February 26th.

THIS was an action on the case. The action was brought to recover damages; for not taking away goods sold by public sale, and for the difference in price, being a loss on the resale.

In an action on the case, for not taking away goods sold by public auction, and for a loss on the resale, the Plaintiff may recover on the count for goods bargained and sold; and it is no objection to his right to recover on that count, that he has not the goods then to deliver, in case he had a verdict.

The declaration set out the conditions of sale, and averred the sale of the goods specified. One averment in the declaration, in setting out the conditions of sale, was, "That the purchaser should make a deposit of —*l.* (not setting out on the record any sum whatever); and that if any purchaser should omit to take away the goods within the time limited by the conditions of sale, it should be lawful to resell them by public sale, or private contract," &c.

The Plaintiff proved the purchase of the goods, and the conditions of sale; but it appeared that ten *per cent.* was to be made as a deposit.

Gibbs objected to the variance; and that the Plaintiff could not recover.

It was answered by the Plaintiff's counsel, who seemed to admit the objection to be valid, That putting that out of the question, there was a count in the declaration for goods bargained and sold, on which

which the Plaintiff would be entitled to recover : That the Defendant had became the purchaser ; and they were property knocked down to him, though never delivered, by reason of his own default : That he was therefore liable for the price of the goods, as bargained and sold.

Gibbs contended, That he could not be liable : That it appeared, in this case, the goods had been resold ; and the action was brought for the loss on the resale. In the case of goods bargained and sold, the Defendant must be in a situation to deliver them, the contract being on an existing sale and a non-delivery ; but here the Plaintiff, in case he recovered on the count for goods bargained and sold, would not have the goods to deliver.

Lord ELLENBOROUGH said, That that could not prevent the Plaintiff from recovering ; for if he had recovered on the count for goods bargained and sold, the Defendant might maintain an action of trover for them. As soon as the lot was knocked down to him, he became the buyer : they were goods bargained and sold, &c.

Verdict for the Plaintiff on all the counts, except the first.

Erskine, Garrow, and Giles for the Plaintiff.

Gibbs and Wigley for the Defendant.

CARTER v. BOND.

February 26th.

THIS was an action of debt on bond.

The Defendant was a publican at *Woodbridge*, in *Suffolk*; at whose house a Benefit Club used to meet. The box, containing the subscriptions, was entrusted to his care; and the bond, on which the action was brought, was conditioned for the safe keeping and producing on the club-night, in good order and condition, without fraud or deceit, the box, containing the amount of the subscriptions of the Benefit Society, so held at the Defendant's house.

A bond, conditioning for the production of a box, containing the subscriptions of a Friendly Society, need not be stamped.

The declaration then assigned a breach: that the Defendant did not deliver the box of the society in good order and condition; but, on the contrary, delivered it with two of the locks broken; and 82*l.* 10*s.* which had been contained in it, taken out.

The bond, when produced, was not stamped.

This was objected to; but it was answered, That under the statute of 33 *Geo.* III. c. 54, the Friendly Society Act, it need not be stamped.

Garrow contended, That this bond was not within the meaning of the act; which he produced.

Lord ELLENBOROUGH, referring to the act, said, Under the words of the act, which he read, he was of opinion, that this was a bond within the act. — *Vide* sect. 4.

In the course of the cause, *Erskine* offered in evidence a paper, in the following words, and signed by the Defendant: — “Whereas the box belonging to the

the —— Society, of *Woodbridge*, held at my house, has been robbed of the sum of eighty-two pounds ten shillings; and for which I have given security: and now I do hereby promise to pay the said club the said sum of eighty-two pounds ten shillings by ten pound a month, until the whole is discharged." He then proved that the Defendant had paid 10*l.* in part.

Garrow objected: That this being an unstamped piece of paper, containing a promise to pay, and was a promissory note; and as, on the face of it, it purported to be so, it should have a proper stamp.

Erskine contended, on the other side, That to make a stamp necessary, it must be established, that the paper offered in evidence was one on which the Plaintiff proposed to recover, either as a promissory note, or as an agreement; or to use the paper as evidence of an agreement, which the statute required to be stamped; but the action here was on the bond. The paper offered in evidence was not to charge the party with a debt arising under the paper in any respect; in which case a stamp might be necessary, either as note or agreement, or as evidence as agreement. Here the Defendant was sued on the bond, an instrument under seal; so that any agreement to pay the money was merged in the bond, and the Plaintiff must recover on it; and could not on the simple contract. The paper produced, admitted that the box had been robbed, *valeat quantum valere potuit*: it stated, That he was liable to pay the money taken: he offered it as evidence to that effect, and no more.

Lord ELLENBOROUGH said, He thought the
paper

paper was admissible in evidence : the beginning of it reciting that the chest had been robbed; shewed that it never was intended to be, nor could be taken as a promissory note ; no stamp therefore appropriated to that instrument was necessary. It was not produced to charge the Defendant, nor as a mode of proof to that effect ; and did not therefore require any stamp, as not being able to operate for either of these purposes.

Verdict for the Plaintiff.

Erskine and *Dampier* for the Plaintiff.

Garrow and *Abbot* for the Defendant.

STOYTES v. PEARSON.

March 1st.

THIS was an action of debt on bond.

Plea of *Non est factum*.

The defence intended to be relied on was, The bond had been delivered merely as an *escrow*, and not as a deed.

The counsel for the Plaintiff relied, That this was a matter which, if true, ought to have been pleaded ; and which could not be given in evidence under the general issue of *non est factum*.

The Defendant's counsel insisted, That if the fact was that the instrument declared upon was delivered as an *escrow*, it was not the deed of the Defendant ; and so was good evidence, under the issue " that it was not the deed of the Defendant," as he had pleaded ; and these authorities were cited,

Comyn's

Under the issue of *non est factum*, the Defendant may give in evidence that the instrument was delivered as an *escrow*.

Comyn's Digest, title *Fait*; 6 *Mod.* 217; and *Sir Thomas Raym.*

LORD ELLENBOROUGH said, That when the objection was first made, it had raised a doubt in his mind; but that it appeared to him, on consideration, that as delivery was necessary to give effect to a deed where an instrument, under seal, was delivered as an *escrow*, the delivery was conditional only, and not absolute. The delivery as an *escrow*, seemed to be a special *non est factum*; and so might be given in evidence, under the issue on the record. He would therefore admit the evidence, and take a note of the objection, if the Plaintiff was inclined to move it.

Park and *Marryatt* for the Plaintiff.

Garrow for the Defendant.

March 2.

LEEDS v. COOK *et Ux.*

Where a letter has been written by the Plaintiff to a witness, and the witness has had a *subpoena duces tecum*, but has previously delivered the letter to the Plaintiff, who refuses to produce it, parol evidence of its contents is admissible.

THIS was an action on the case, for breach of promise of marriage.

Plea of the general issue.

The Plaintiff proved the promise to marry him, made by the Defendant's wife before her marriage; and that settlements had been drawn and executed preparatory to it. He then proved, that she had eloped with and married the Defendant; and there rested his case.

The Defendant and his wife gave in evidence, in mitigation of damages, that the Plaintiff had conducted

conducted himself with great impropriety, misconduct, and indifference while he paid his addresses to her; so that he had received no injury, as to his feelings, from her having married, as, in fact, he entertained no serious affection for her.

Among other matters, That the morning after she had eloped with the Defendant, her present husband, he had written a letter to another young woman, of the name of *Turpin*, to whom he had made proposals of marriage.

Miss *Turpin* had been subpœna'd with *a. duces tecum* of the letter.

She was called, and asked for that letter. She said, That after the action brought, she had given it to the Plaintiff, who said he would send it up to his attorney.

The letter was called for from the attorney; and not being produced, the Defendant's counsel proposed to give parol evidence of its contents.

It was objected to; there not being any notice to produce it. To which it was answered, That it could not be known that it was in the Plaintiff's possession, as he had clandestinely procured it since the action brought.

LORD ELLENBOROUGH said, He would admit evidence of its contents: That it belonged to the witness called, and was subtracted in fraud of the subpœna: That as therefore the Plaintiff secreted it, and had refused to produce it,—*in odium spoliatoris*, parol evidence of its contents should be admitted.

In the course of the cause, the Defendant gave
in

in evidence many expressions used by the Plaintiff at different times; in which; speaking of the Defendant's wife, he gave great proof of want of feeling, as well as of gross manners and sentiments.

In summing up to the jury, Lord ELLENBOROUGH said; That notwithstanding what had passed, and the promise of marriage proved, if the Plaintiff had conducted himself in a brutal or violent manner, and threatened to use her ill, a woman, under such circumstances, had a right to say she would not commit her happiness to such keeping; and she might set up such defence, and it would be legal: but though no such evidence appeared, which went to the ground of action, if the Plaintiff appeared to be of gross manners and destitute of feeling; as he complained by this action of an injury in the loss of the society of a woman which he appeared never to have valued; and the pleasures of which society he seemed little calculated to taste, the jury should take it into their consideration in the verdict they were to pronounce.

The jury found a verdict of 1s. damages.

Erskine, Gibbs, and Wigley for the Plaintiff.

Garrow and Lawes for the Defendant.

ISRAEL v. CLARK and CLINCH.

THIS was an action on the case, against the Defendants, as proprietors of the *Gosport* coach, to recover damages for an injury received by the Plaintiff, arising from the overturning of the Defendants coach; in consequence of the axle-tree having broken.

Tho' there are no more outside passengers on a coach than are allowed by the statute: for an accident arising from a want of strength in any part, the owners shall be liable.

One count in the declaration assigned the injury to have arisen from the overloading of the coach.

Mr. *Erskine* stated it to have been laid down by Lord KENYON; That if the owners of the coach take up more passengers than are allowed by act of parliament, that that should be deemed such an overloading, that in case of an injury being laid in the declaration to have arisen from overloading, the excess above the number should be deemed conclusive evidence of the accident having arisen from that cause.

Lord ELLENBOROUGH assented.

The Defendants counsel directed their cross-examination to prove, That no more passengers were on the roof at the time, than were allowed by act of parliament.

Lord ELLENBOROUGH said, That it was by no means to be taken as a rule, because Mr. *Gamon's* act allowed a certain number to ride on the roof; that the coach-owners were therefore entitled, at all events, to carry that number; if they carried more, they were liable to its penalties; but it had nothing to do with this question. They might not be entitled to carry so many: it depended upon the

strength of the carriage. They were bound by law to provide a sufficient carriage for the safe conveyance of the public who had occasion to travel by them. At all events, he would expect a clear land-worthiness in the carriage itself to be established.

Verdict for the Plaintiff.

Erskine and Marryat for the Plaintiff.

Garrow and 'Espinasse for the Defendant.

MASSITER v. COOPER.

Though a postmaster cannot be compelled to hire a chaise, if he does hire it, and the passenger takes his seat in it, the postmaster must proceed if his fare is tendered.

THE declaration stated, That in consideration that the Plaintiff had hired a certain chaise and horses of the Defendant, to carry the Plaintiff from a certain house, called *The Gloucester Coffee-House*, to *Hounslow*; the Defendant undertook to carry him: then averred a breach, that he had not done so.

The Plaintiff proved, That having been disappointed of a seat in the mail-coach, he sent for a chaise to the Defendant, who was a person keeping chaises for hire: That it came; and his luggage was tied on, and he got into it.

The chaise was taken to go from the *Gloucester Coffee-house* in *Piccadilly*, to *Hounslow*. When he was sitting in the chaise, the post-boy came up, and demanded 18s. The Plaintiff said it was an exorbitant charge: that he would pay him when he got to *Hounslow*, as he could then enquire what was the reasonable fare.

The post-boy said, If he did not, he should not go in the chaise; but he would take 16s.

The

The Plaintiff gave the same answer as before, and the driver went for his master ; who came, and held the same language as the post-boy. The Plaintiff afterwards tendered the 16s. which the Defendant refused to take ; and drove off the chaise into the Defendant's yard ; and the Plaintiff was obliged to hire another chaise.

Erkine for the Defendant. There is no particular rate at which persons are bound to let out their chaises and horses. If a man deals with me for my chaise, he cannot take me out of the usual course of my business. If a man hires a chaise, he must take it at the hire the owner imposes, unless there is a special contract, or the owner has an established mode of dealing : if it had not been his usual course of dealing to demand the payment before the chaise went out, he had no right to stop it after the hiring it, and the Plaintiff had got into it ; but if it was his usual course, he had a right to say that no person should have it on any other terms.

LORD ELLENBOROUGH, in summing up to the jury, said, In ordinary cases, if a person is permitted to go into a chaise, and to put on his luggage, it is too late for the person who hires out the chaise to object to its going on the journey. The owner might make his own regulation : he might say he would not let strangers have his chaise, nor go at night, unless the money was paid before-hand ; and if it is the usual mode of his dealing, he had a right to insist on it : but even if that was the course of his dealing, if the person was in the chaise, and tendered the money, the owner of the chaise was bound to proceed on the journey ; there was an in-

ception of the contract, and he was bound to complete it. If therefore the jury find the tender, the Plaintiff was entitled to recover.

Verdict for the Plaintiff.

Gibbs and Lawes for the Plaintiff.

Erskine for the Defendant.

THOMAS *et alt.* v. DAY.

A warehouseman is liable for goods lost or injured, from the time the crane is applied to raise them into the warehouse; and it is no defence that they were injured by falling into the street from the breaking of tackle, the carman who brought the goods having refused the offer of slings, for further security.

THE declaration stated, That in consideration that the Plaintiff had sent and delivered six packs of linen, to be housed, lodged, and warehoused in a certain warehouse of the Defendant; That the Defendant undertook safely and securely to take care of, lodge, and warehouse them: then assigned a breach, that he did not safely and securely lodge, house, and warehouse them: That two packs of linen were damaged and spoiled, by being left in the open street, after falling on the pavement, and thereby wetted and spoiled.

The Plaintiffs were shipping-brokers; the Defendant was a warehouseman.

It was proved by the Plaintiffs, That, on the 2d of *July*, they had sent the six packs of linen in question to the Defendant's warehouse: That the person sent saw the Defendant's clerk, who gave him the tackle which he applied to the packages; and removed five into the warehouse; and the sixth was left in the crane when he went away, the Defendant's servant having paid the carriage.

Another witness then proved, That in a short time after, going by, he found one of the packs in the

the street. It was drenched in water; and seventy-nine pieces of linen spoiled.

The Defendant denied that he was liable to make good the damages, on the ground that the accident had happened from the cords of the packs breaking, his servant having offered to give slings to the carman to make them more secure; which had been refused: That it was the duty of the person sending the goods, to see that they were well corded and secured, so that if any accident happened from their breaking, the warehouselman was not liable.

These facts he proposed to prove; and that, in addition to it, warehousemen did not consider themselves as liable by usage, under the circumstances above stated.

LORD ELLENBOROUGH said, The whole question turned upon the single point of, When the warehouselman's liability commenced, and the agency of the carman ended? for until the goods were delivered to the warehouselman, the carman was to be considered as the agent of the person sending them; but when the warehouselman took them into his own hands, the moment the warehouselman applied his tackle to them, from that moment the carman's liability commenced.

It has been urged, said his Lordship, That the Defendant's servants offered him the use of slings. These are provided by the Defendant; and he is bound to see that they are of sufficient strength, and fit for the purpose; and he should not apply his tackle, unless that could be performed which he was bound to. If the slings were necessary, the refusal of the carman,

or his declining the use of them, will not exempt the warehouselman: he ought to have insisted on the carman's using them; and if he refused, he should have repudiated those goods, and refused to accept them.

It appears here, that the damaged pack of linen was in the crane, and lifted from the cart: it was then in his possession; and being so, I think, in point of law, he is liable for the loss.

Verdict for the Plaintiff.

Garrow, Park, and Cowley for the Plaintiff.

Erskine and Gibbs for the Defendant.

March 31.

WITHAM v. LEE.

Where a note, not void, but voidable, as given for what is *malum prohibitum*, is given up in consideration of another note given at a distant day, the illegality of the consideration of the former note cannot be set up in an action on the latter.

ASSUMPSIT to recover the amount of two promissory notes given by the Defendant, payable to the Plaintiff, for the sum of 70*l.* and 34*l.*

The circumstances were these: — The Defendant had given to the Plaintiff's father a note for 100*l.*: the Plaintiff had administered to him.

After the death of his father, he had sued the Defendant; but had, upon the solicitation of the Defendant, agreed to divide the debt, and to take the two promissory notes, upon which the action was brought, payable at distant and different dates.

The defence relied on was, That the Plaintiff's father and the Defendant had been concerned in lottery insurances together; and that the note given to the Plaintiff's father was given for that consideration: and it was contended, That the consideration

consideration of the first note being void, it could not be made good by the substitution of the notes in question; but that they should be affected with the same illegality, and the Plaintiff thereby disabled from recovering.

The Plaintiff's counsel contended, That the giving the new security was a waiver of any objection to the illegality of the first note, even had there been such illegality in the consideration as was stated, but which they denied; and referred to the case of *Cuthbert v. Haley*, 8 T. Rep. 390.

Lord ELLENBOROUGH said, There might be a difference in what constituted the consideration of the first note, as to its effect on the substituted ones. If the consideration of the first note was *malum in se*; or if the consideration of the first note was what the law has declared should render the security void, as for gaming or usury, the substitution of the second notes could not make them good: but when the consideration was merely *malum prohibitum*, he thought there was no objection to a party waiving such objection: That if it appeared that the notes upon which the action was brought had been voluntarily given, and the first note given up in consideration of the Plaintiff receiving the others, he was of opinion, the Plaintiff was entitled to recover on them.

The Plaintiff proved that they had so been given, and the former note delivered up to the Defendant; and had a verdict.

Erskine and *'Espinasse* for the Plaintiff.

Gibbs for the Defendant.

March 3d.

THELLUSON v. COSLING,

To ascertain the date of a declaration of war, the declaration from the Ambassador of the Court abroad, transmitted by him to the Secretary of State's Office, is evidence.

ASSUMPSIT on a policy of insurance on the ship *Malabar*, from the *Mauritius*, in the *Ile of France*, to *Toulon*.

Loss by capture.

The capture was by the ship going into *Cadix* on the 12th of *March*, 1793, where she was detained, hostilities having then taken place between *Spain* and *France*.

It was stated, That war had not then been declared by *Spain* against *France*; which declaration had not taken place until the 23d of that month. It therefore became material to ascertain when war was actually declared.

LORD ELLENBOROUGH said, That must be proved, not by newspapers, or by such unauthenticated publications.

To prove it, the Plaintiff's counsel called a clerk from the Secretary of State's Office. He produced a book, from whence he took a paper; and from which he stated, That war was declared by *Spain* against *France* on the 23d. Being asked what that paper was, — he said, That it was in *Spanish*; and was the declaration made by the Court of *Spain*, and transmitted from thence by Lord *St. Helen*, our ambassador at *Madrid*, to the Secretary of State's Office here.

That

That was held to be sufficient evidence; and the Plaintiff had a verdict.

Gibbs, Park, and Giles for the Plaintiff.

Erskine, Garrow, and Carr for the Defendant.

BROWN v. SAUL.

ASSUMPSIT for goods sold and delivered.

Plea of *Non-assumpsit* to the whole, except 2*l.* 11*s.*; and as to that, tender and issue on the tender.

A tender of a Bank of England note is good, if not objected to at the time.

The Defendant proved, That before the action brought, he tendered to the Plaintiff two one-pound Bank of *England* notes and eleven shillings in money. The Plaintiff refused, saying, That more was due.

The question was, Whether this was a legal tender? and said to have been decided in the Common Pleas not to be a legal tender.

LORD ELLENBOROUGH ruled, That as the Plaintiff had not objected to the notes, and required them to be turned into money, that the tender was good.

The Defendant had a verdict.

Espinasse for the Plaintiff.

Garrow for the Defendant.

BALLINGALLS v. GLOSTER.

An action lies immediately against the indorser of a bill of exchange refused acceptance, without waiting till the time has run for which the bill was drawn.

THIS was an action on a bill of exchange for 250*l.* drawn by one *John Gloster*, of the island of *St. Vincent*, on one *Jackson*, in favour of the Plaintiff, ninety days after sight. The Defendant indorsed it to the Plaintiff. The bill was dated the 26th of *March*, 1801.

The Plaintiff afterwards presented the bill to *Jackson*, who refused to accept it. The Plaintiff then, without waiting for the expiration of the time for which the bill was drawn, brought this action against the Defendant, as the indorser of the bill.

It was contended for the Defendant, That the bill being drawn at ninety days after sight, the indorser could not be called upon for payment till that time was expired, after the bill had been tendered for acceptance: That the action having been brought before that time, was commenced too soon; and that the Plaintiff should therefore be nonsuited.

It was answered for the Plaintiff, That the moment the acceptance was refused, the holder had a right to have recourse to the indorser, as between the indorser and the indorsee, the indorser was as a new drawer; and that it had been decided in a case in *Douglas* (*Milford v. Mayor*, *Doug.* 54.) that where a bill was drawn, payable at any number of days after sight, which was refused acceptance, that

that the payee was not obliged to wait till the expiration of the number of days mentioned in the bill, but might have recourse immediately to the drawer, from whom he received it: That on principle, there was no difference between that case and this, as the indorser was as a drawer to the indorsee.

LORD ELLENBOROUGH ruled, That the Plaintiff's action was well brought: That he was under no obligation to wait till the expiration of the time mentioned in the bill before he brought his action; but might have recourse immediately to the indorser: That the indorser was to be considered clearly as a new drawer, with respect to his indorsee.

His Lordship, however, gave leave to the Defendant to move to set aside the verdict.

Verdict for the Plaintiff.

Erskine and *C. Warren* for the Plaintiff.

Gibbs and *Const* for the Defendant.

This cause was afterwards moved; but the Court of *King's Bench* concurred in opinion with the Lord Chief Justice.

March 5.

THORNTON *et alt.* v. DICK *et alt.*

If the drawer of a bill has put his name on it as acceptor, he cannot afterwards, by erasing his name, discharge his acceptance.

THIS was an action of *assumpsit* by the Plaintiffs, as indorseees of a bill of exchange for 470*l.* dated the 23d of *September*, 1799, against the Defendants, as the acceptors.

The bill was drawn on the Defendants from *Liverpool*, by one *Cullen*, payable to the order of *Noble*, three months after sight, and indorsed to the Plaintiffs.

Quintin Dick and Co. the Defendants, were merchants in *London*, who had been concerned in business with *Cullen* to a very great extent; and, at the time of drawing the bill, were very considerably in advance for him.

The bill came by post to the Plaintiffs on the 1st of *October*; and was sent by their clerk, in the usual way, to the Defendants counting-house, and left for acceptance. Contrary to the common course of business, the clerk had not called for it the next day; but had suffered it to remain at the Defendants until the 11th. When he called for it, it appeared that the words "accepted the 1st of *October*, 1799, *Q. Dick* and Co." had been written on the bill; but they were then, in a great measure, erased by black ink: there was also an appearance of an attempt to cut off these words; but still enough appeared to shew that words had been erased; and, in fact, it was not denied by the Defendants.

The counsel for the Defendants, upon this state
of

of facts, relied, That the Defendants could not be charged as acceptors of the bill, nor be liable in that character : That the reason for leaving the bill with the drawee was, for the purpose of giving him time to look into the state of the account between the drawer and himself, in order to regulate his conduct with respect to the acceptance : That he therefore was not bound by the act of writing on the bill, until he had delivered it out as his acceptance ; and thereby sent it accredited into the world. Had the case been put of a bill, upon which drawee had inadvertently, at first, put his name, but afterwards finding from circumstances, that, in point of prudence, the bill ought not to have been accepted, it was contended, That as to third persons, this should not bind the drawee ; but that he should be at liberty to erase the acceptance which he had written : That here the bill having been left on the 1st of *October* ; and when called for, not having the name of the Defendants on it, that it could not be considered as an accepted bill.

On the other side it was contended, That the Defendant had made himself absolutely liable, by putting his name on the bill ; and that he could not recall it. On the 1st of *December* the Plaintiffs were entitled to a bill, accepted by *Quintin Dick* and Co. ; and they could not discharge themselves by their own act. It was also stated, That in the case of *Trimmer v. Oddy*, before Lord KENYON, this point had been decided, that the Defendant was bound by his acceptance, once made, though afterwards erased.

Lord

Lord ELLENBOROUGH asked, If the acceptance was legible ?

It was answered, That the facts stated, with respect to the erasure, were admitted.

His Lordship then said, That in the case cited, there had been no doubt as to the law ; but the difficulty then was, Whether the bill, which was produced in a defaced state, had ever been accepted ? So that it became a question, Whether it should have been declared on as an accepted bill, or as a defaced one, according to the truth ? But the acceptance having been proved to have once taken place, he had no hesitation in saying, That the act of acceptance was irrevocable ; and that if a party once accepted a bill of exchange, he had done the act, and could not retract. The moment the bill was accepted, he was bound, and the bill began to run ; and the holder had a right to hold him to that liability which he had undertaken, and from which he, by his own act, could not discharge himself.

One of the jury, which was a special one, after observing on the importance of the question to the mercantile world, asked his Lordship, If there was not a distinction between the cases, where the bill was payable after sight, or after date ; inasmuch as the bill began to run after acceptance, where it was payable after sight ; but not so where it was payable after date.

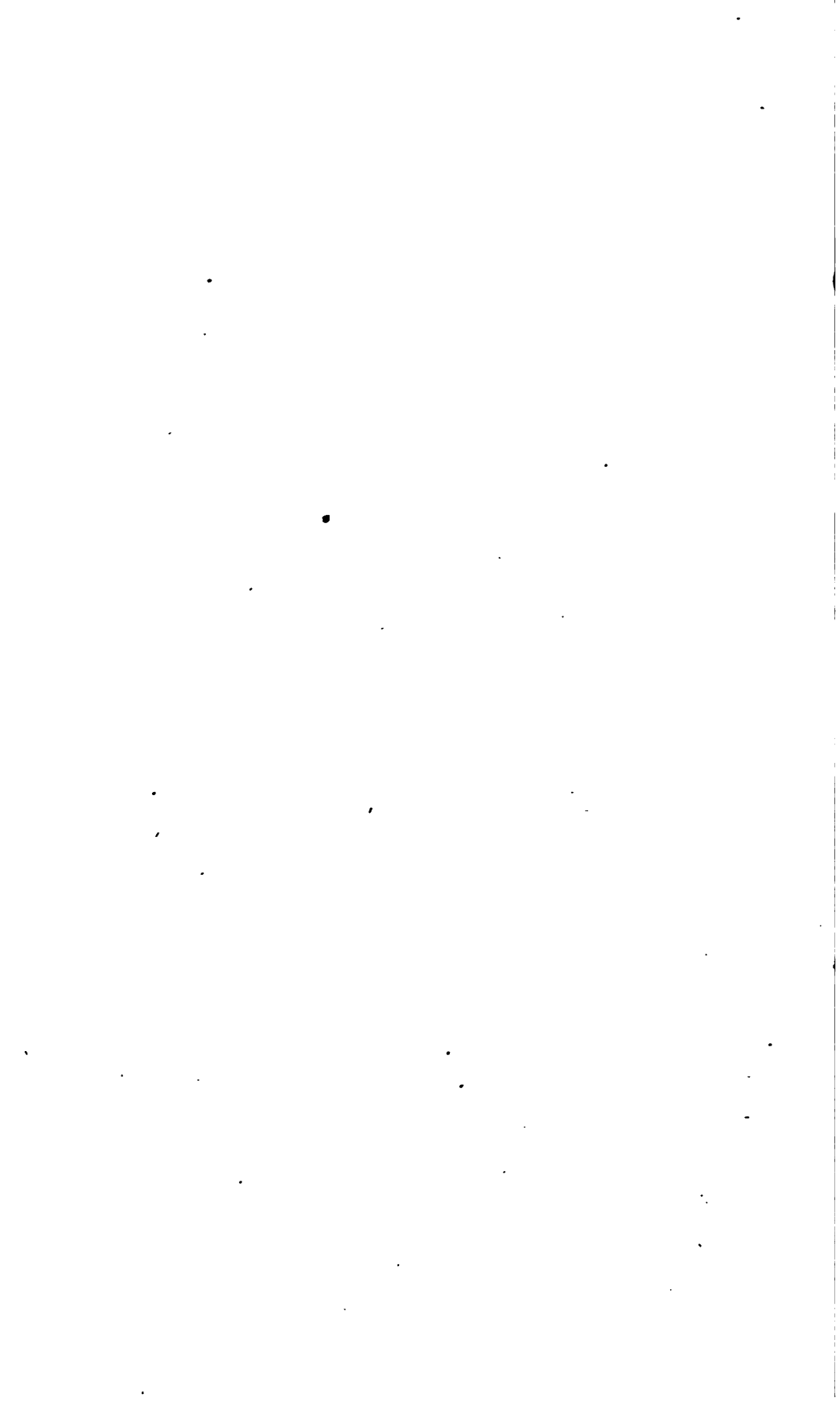
Lord ELLENBOROUGH answered, That he had no manner of doubt on the case ; That there was no difference in point of legal effect, whether the bill was payable after sight, or after date ; and that the law

law was the same as to both. An acceptance once given, could not be recalled. If it was considered as a point of difficulty, or there was a doubt as to the law, the Defendant might move for a new trial.

Verdict for the Plaintiff.

Gibbs, Park, and —— for the Plaintiff.

Erskine and *Garrow* for the Defendant.



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A.

Adultery.

1. If a married man neglects the society of his wife, and openly lives with other women in the apparent practice of adultery, he can maintain no action against another for criminal conversation with his wife. *Wyndham v. L. Wycomb.* P. 16
2. Letters written by the wife to her husband before there was any suspicion of adultery, are evidence to prove the state of connubial affection in which they lived, where, from the necessity of their situation they lived apart. *Edwards v. Crock.* 39
3. The misconduct, neglect, or infidelity of the husband cannot be set up as a defence for the infidelity of the wife, in an action for crim. con. in C. P. *Bromley v. Wallace.* 207

Advertisement.

An advertisement published in the newspaper, concerning any person, though conveying with it an imputation injurious to the character of the party about whom it is published, is not a libel, if done *bona fide*, and with a view of obtaining information on the subject alluded to in the advertisement, by a person really interested in the discovery. *Denby v. Jones.* 191

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Where the subjects of a foreign country enter there into an agreement conformable to the laws of that country, they cannot by a subsequent agreement contravene those laws. *Hulle v. Heightman.* Page 75

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If a special agent is empowered to purchase goods at a certain price, and considers himself at liberty to exceed that price, his principal shall be bound by his contracts, though made at a price beyond what he was authorized to give. *Hicks v. Han-kin.* 114

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1. If the Plaintiff in an action to recover back the consideration of an annuity, states that a warrant of attorney, part of the securities, was set aside, it must be proved; and the production of the rule of court in which it was so mentioned to be set aside, is not sufficient. *Compton v. Chandless.* 18
2. When an annuity is void for a defect in the memorial, and the grantee brings an action to recover the consideration, the grantee, under a plea of set-off, may give in evidence the whole of the payments made on account of the annuity; but if any account of more than six years.

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- years standing, the Plaintiff should reply the statute of limitations. *Hills v. Hills.* 196
3. When the grantee of an annuity pays the purchase money on a particular day into a banker's hands, in the joint names of his attorney and the grantor, to be paid over to the grantor on the execution of a particular deed, and it is done on a subsequent day, the memorial properly states the payment as made on the latter day. *Coare v. Gible.* 231

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1. An arbitrator cannot maintain assumpsit for any sum of money for his trouble, unless there has been an express promise. *Vivary v. Warner.* 47
2. When matters have been referred to arbitration, it is matter of evidence whether a particular matter of complaint has been subjected to the arbitrators consideration. *Martin v. Thornton.* 180
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In an action of assault against two, damages cannot be severed, tho' the assault be proved to have been committed by one Defendant with more violence and more circumstances of aggravation. *Brown v. Allen and Oliver.* 158

Assumpsit.

1. Where sailors have sailed under written articles, by which they are bound to serve to the

end of the voyage; if the master by ill treatment compels them to leave the ship, they must declare specially for the injury; and cannot declare generally for work and labour for the time they have served. *Hulle v. Heightman.* Page 77

2. Where an agreement has been entered into by deed to demise premisses, but by words not amounting to an actual demise, such an agreement being by deed, shall not prevent the party from maintaining assumpsit for use and occupation. *Elliott v. Rogers.* 59
3. Assumpsit will not lie to recover the value of prints of an obscene, criminal, or libellous tendency. *Fores v. John.* 97
4. When a party indebted to another, consents to pay over that money to a third person, the latter can maintain assumpsit for it. *Surtees & alt. v. Hubbard.* 204

Attorney.

1. If an attorney is in partnership with another, and they carry on business in their joint names, each of them is liable to the penalties of the stat. 37 Geo. III. for practising without a certificate; though, from the cause in question, the Defendant had no benefit, in consequence of an arrangement between themselves. *Edmonson v. Davis, &c.* 14
2. Under a general order to do what is needful, an attorney is authorized to do all the business connected with or arising out of that which was the immediate matter for which he was employed. *Dawson v. Sir R. Lawley.* 65

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3. An attorney employed by consent of two parties, in preparing a deed from one to the other, cannot be examined as to what he so became informed of in preparing the deed, when the action is brought by the assignees of one against the other, suggesting fraud in the deed. *Robson* and another, assignees of *Blakey*, v. *Kemp* and another. Page 235

Auction.

- In an action on the case, for not taking away goods sold by public auction, and for a loss on the resale, the Plaintiff may recover on the count for goods bargained and sold; and it is no objection to his right to recover on that count, that he has not the goods then to deliver, in case he had a verdict. *Mertens* v. *Adrock*. 251

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2. When a bankrupt pleads his certificate in bar, and the Plaintiff relies that it is void, under the statute 5 Geo. II. c. 30, he cannot in evidence impeach the commission by impeaching the petitioning creditor's debt; he must impeach the certificate only. S. C.
3. Unless the petitioning creditor signed the certificate S. C.
4. If a creditor obtains goods from his debtor, on the eve of a bankruptcy, by pressing him for payment, and it does not appear to be voluntarily done to give a preference, the creditor may hold those goods, though the money was not actually then due. *Hartshorn* v. *Slodan*. 60
5. Though a commission of bankruptcy may be rendered void by reason of the petitioning creditors taking money or goods from the bankrupt, under statute 5 Geo. II, it cannot be considered as void in an action at law; but as superseable only by application to the Chancellor. *Garratt* v. *Sir Theophilus Biddulph*. 104
6. When a person is examined at a private examination before commissioners of bankrupts, and that examination is taken down, it is sufficient if so much only is taken down as is conceived to be necessary to be used in evidence, provided such part has been read over to him, and he has signed it: the whole of his examination need not be taken down to make that evidence which applies to the matter in dispute. *Milward*, assignee of *Gates*, v. *Ferbès*. 174
7. Though it is shewn that an antecedent act of bankruptcy has taken place, the party impeaching the existing commission must shew a petitioning creditor's debt then legally subsisting, to support a commission. *Miles* and another v. *Rawlins* and another, Sheriff of *Middlesex*. 194
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complete when the commission was sued out. *Glassington*, assignee of *Dickie*, v. *Rawlins* and others. Page 224

9. A general authority from one of several assignees of a bankrupt's estate to the others to act for him, and use his name, is not sufficient to enable the others to execute a release by deed; there must be a special authority for that purpose. *Williams v. Walsley*. 220
10. The declaration of a bankrupt, as to any matter or deed which may constitute an act of bankruptcy, if made after the deed done, are not evidence. *Robson and another*, assignees of *Blakey*, v. *Kemp* and another. 233

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1. A married woman, whose husband has been transported for seven years, may maintain an action as a *feme sole*, on the ground that the husband had abjured the realm, and that, though the term of his transportation had expired. *Carrol v. Blencow*. 27
2. If a husband turns his wife out of doors; by a general advertisement in the public papers, to persons not to trust, or by particular notice to individuals, he cannot exempt himself from a demand for necessaries furnished to her while she was so living apart. *Harris v. Morris*. 41
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Bills of Exchange.

1. In an action on a bill of exchange against the acceptor, where the defence is forgery by the drawer, he is notwithstanding a good witness to prove the hand-writing of the Defendant to the acceptance. *Dickenson v. Prentice*. Page 32
2. In an action on a foreign bill of exchange, to prove the hand-writing of the Defendant, it is evidence to go to the jury, that a person who has seen the party write once, thinks it is like his hand-writing, though he has no belief on the subject. *Gareils v. Alexander*. 37
3. Where a payment has been made in bills, it is a good evidence of payment; and it shall be presumed that they were paid, unless the contrary is shewn. *Hobden v. Hartfink*. 46
4. If a bill has been regularly noted upon being dishonoured, the protest may be drawn up at any time afterwards. *Chaters v. Bell*. 48
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In an action against two, for negligently driving a chaise, if the Defendants have hired it jointly, and were jointly in the possession of it, both are liable for the accident. *Aliter*, if it belonged to one only, and the other was merely a passenger. *Dancey v. Chamberlain* and another. 229

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When carriers give notice that they will not be liable for goods lost beyond the value of 5*l.*, that extends to the property of passengers going by the coach, or other carriage; and not to goods sent to be carried only. *Clark v. Gray.* 177

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Deed.

When an instrument, executed in the presence of a subscribing witness, is offered in evidence, whether in chief in the cause against the Defendant, or collaterally, it must be proved by the subscribing witness; nor shall the admission of the execution of it, by the party who executed it, be received. *Manners q. t. v. Postan.* Page 239

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14. When a person is examined at a private examination before the commissioners of bankrupts, and that examination is taken down, it is sufficient if so much only is taken down as is conceived necessary to be used in evidence, provided such part has been read over to him, and he has signed it; the whole of his examination need not be taken down to make that evidence which applies to the matter in dispute. *Milward, assignee of Gates, v. Forbes.* 172
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2. An unqualified and unlicensed person may join in the sport with a person lawfully entitled to kill game, if he merely joins in the sport, and is not himself a principal, or using his own dogs. *Molton v. Rogers.* 217

Goods.

1. Where a party bespeaks an article at a certain price, pursuant to

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to a specimen, and on delivery it is found to be of inferior performance, in an action for the goods sold, the inferiority to the specimen cannot be set up in reduction of the price; it should have been returned, and the contract rescinded. *Grimaldi v. White.* Page 95
Vide Transitu.

2. Where goods have been ordered by an agent, who has a power of disposing of them as he thinks fit, for his principals, if they come to his possession, though not to his principals, they cannot be stopped *in transitu.* *Leeds v. Wright.* 243

Guarantee.

A guarantee to the amount of a certain sum of money, given for a third person, cannot be set off. *Crawford and others v. Stirling.* 207

H.

Hand-writing.

A clerk in the post-office, acquainted with hand-writings, and able to distinguish a false from a real hand, cannot be allowed to give evidence that a hand-writing, which he swears to be a feigned one, is written by the same person whose hand-writing is proved to the other writings, by comparing them together. *Rex v. Cator.* 117

I.

Imprisonment.

An action for false imprisonment will lie against a person who

makes an ill-founded charge before a constable, whereby the person is committed; but not against the constable, unless he knowingly assisted in the oppression. *White v. Taylor.* P. 89

Infants.

In an action against the acceptor of a bill of exchange, by the indorsee, it is no defence that the drawers, who had drawn the bill payable to themselves, and of course indorsed it, were infants when the bill was drawn. *Taylor v. Croker.* 187

Insurance.

1. Though unnecessary delay may avoid a policy of insurance, that shall not be deemed so which is employed in necessary repairs of the ship, if the policy is *at and from* a place. *Smith v. Surridge.* 25
2. A person who insures a ship as owner, must so stand in the registry of ships in the custom-house. *Marsh v. Robinson.* 98
3. An American, who resides with his family in *England*, is so far considered as a *British* subject, that if he freights a ship, and insures her, warranted *American* property, the warrant shall be held to be false; and the insurance void. *Tabbs v. Bendelack.* 108

Interest.

Under a particular of the Plaintiff's demand, stating that the action was brought to recover the amount of a note of hand, interest on it is recoverable when the note is payable by installments;

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installments; and on failure of any installments, the whole is to become due: the interest is to be calculated on the whole sum remaining unpaid, on default of any installment, and not on the respective installments at the respective times when they would become payable. *Blake, executor of Dale, v. Lawrence.*

Page 147

Joint.

Where an action is joint, a release from one of the Plaintiffs is good, to render a witness competent. *Hockless v. Mitchell.*

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Judgment.

In an action on a foreign judgment, it is not sufficient to prove the hand-writing of the Judge subscribed to the judgment; the seal of the colony abroad must be proved. *Henry v. Adey.*

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L.

Legacy.

The legatee for a term of years, on the executor's assenting, may maintain an ejectment immediately to recover. *Query*, If the legatee of any specific legacy of a chattel cannot also maintain an action for it. *Doe* on the demise of Lord *Say* and *Seale v. Guy.*

154

Letter.

1. A letter produced in evidence, in consequence of a notice, and which mentions that it covers

certain papers, does not thereby make such papers evidence, unless they are referred to in the letter, and are necessary to make it intelligible. *Johnson v. Gilson.*

21

2. To a plea of tender and replication of subsequent demand and refusal, a letter sent to the Defendant's house after the tender, and demanding the money, to which an answer is sent out that it shall be settled, is evidence to go to the jury of the refusal. *Hayward v. Hague.*

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3. Where a letter has been written by the Plaintiff to a witness, and the witness has had a *subpoena duces tecum*, but has previously delivered the letter to the Plaintiff, who refuses to produce it, parol evidence of its contents is admissible. *Leeds v. Cook et Ux.*

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Vide *Evidence*, 7. *Libel*, 2.

Libel.

1. An advertisement published in the newspaper, concerning any person, though conveying with it an imputation injurious to the character of the party about whom it is published, is not a libel, if done *bona fide*, and with a view of obtaining information on the subject alluded to in the advertisement, by a person really interested in the discovery. *Delany v. Jones.*

191

2. When a libellous letter refers to a newspaper, as containing the slanderous matters imputed to the Plaintiff, the Defendant may give the newspaper in evidence, in mitigation of damages, under the general issue. *Mullet v. Hulton.*

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Lien.

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Lien.

1. The captain of a ship, who has entered into engagements on the ship's account, thereby acquires a lien on the goods and on the freight to the extent of his engagements. *White v. Baring* Page 22
2. Dyers have a lien on goods sent to them to dye, for the balance of a general account. *Savill v. Barchard.* 53

Lights.

Vide Nuisance.

Limitations (Statute of)

1. Where the demand is of above six years standing, and the Defendant, on being applied to, says, "I think I am bound in honour to pay the money; and I will do it when I am able," this is a conditional promise, and not an absolute one, to take it out of the statute. *Davies v. Smith.* 36
2. Where such a promise is made, the Plaintiff must prove the Defendant's ability at the time of bringing the action. *Davies v. Smith.* 36
3. Where a demand was above six years standing, the Defendant being asked for money by a third person, said, "I must pay Mr. P. (the Plaintiff) first;" this is a sufficient acknowledgement, though not made to the party himself. *Peters v. Brown.* 46
4. When a debt of a bill of six years standing is demanded, and the Defendant says he has paid it, and will shew the receipt; but does not, — it is not such an acknowledgement as takes the

debt out of the statute of limitations. *Buck v. Guy, Gent.* Page 184

M.

Market.

Where a place has been used as a fair or market for twenty years, though such has not been legally constituted, a person who exposes goods there, under the idea that it is a legal fair or market, cannot be indicted for a nuisance. *Rex v. Smith.* 109

Master and Servant.

If a servant employs a tradesman to do any work, who has not been employed before by his master, and the tradesman does the work without any communication with the master, tho' the thing to which the work was done was the property of the master, he is not liable. *Hiscox v. Greenwood.* 174

Memorandum.

1. When an order is given verbally for goods, and the person to whom it is given puts down the terms of it in writing, as a memorandum, but it is not signed by the person ordering the goods, the terms of the order may be given in evidence, without producing the written memorandum. *Dalison v. Stark.* 163
2. When a receipt for money has been given on unstamped paper, it may be used by a witness, who saw it given, to refresh his memory. *Rambert v. Cohen.* 213

Musf.

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Music.

To subject a party to the penalties of the statute 25 Geo. II. c. 36, for keeping a house for illegal dancing and music, it is not necessary that the party who kept the house should take money for admission. *Archer v. Willingrice.* Page 186

N.

Negligence.

In an action against two, for negligently driving a chaise, if the two Defendants have hired it jointly, and were jointly in the possession of it, both are liable for the accident. *Aliter*, If it belonged to one only, and the other was merely a passenger. *Davey v. Chamberlaine* and another. 229

Newspaper.

An advertisement published in the newspaper, concerning any person, though conveying with it an imputation injurious to the character of the party about whom it is published, is not a libel, if done *bona fide*, and with a view of obtaining information on the subject alluded to in the advertisement, by a person really interested in the discovery. *Delany v. Jones.* 191
Vide *Libel*, 2.

Note.

1. A check drawn on a banker, in the name of any person, is not evidence to establish a debt, even though the money was proved to be paid to the person whose name is used. *Gary v. Gerrish.* 9

2. When the payee of a note, the consideration of which is usurious, on being arrested for it, prevails on another person to join him in another note for the full debt, the usury in the first note shall not void the second. *Turner v. Hulme, Gent.* Page 11

Notice.

1. A misdescription of the premises in a notice to quit, is not fatal, if they are otherwise sufficiently designated, that the party to whom the notice has been given, has not been misled by it. *Doe* on the demise of *Cox* and others. 185
2. When an assignment has been executed of property due by a third person, and the party to whom the assignment is made, for the purpose of giving notice to such third person, prepares two notices at the same time, which he signs, and serves one of them on such person, if an action is afterwards brought by the assignees, he can give that notice in evidence which he retained, without giving a notice to produce that served on the other person. *Surtees & alt. v. Hubbard.* 203
Notice to quit, vide *Ejectment.*

1, 2

Nuisance.

1. Where a party entitled to lights, but with some obstructions, removes that obstruction, and it is again restored, but so as to diminish the quantity of light before enjoyed, the party can maintain an action for the obstruction. *Catterel v. Grif-fiths.* 69
2. Where

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2. Where a place has been used as a public fair or market for twenty years, to which people have resorted for the purpose of exposing their goods there to sale, they shall not be liable to an indictment for a nuisance in obstructing the highway, if they were fairly using the market. *Rex v. Smith.* Page 109
3. An indictment will not lie for that which is a nuisance only to a few inhabitants of a particular place. The *King* on the prosecution of *Allen* and others, *v. Lloyd.* 200

O.

Officer.

Action for obstructing one, vide *Sheriff.*

P.

Parish.

To prove the boundaries of a parish, papers respecting it, found in a box belonging to the former incumbent, and by his representative handed over to the successor, are evidence. *Earl v. Lewis.* 1
Vide *Evidence*, 2.

Partner.

1. Where a partner's name does not appear in the firm, he is liable for goods furnished only during the time he was actually a partner, and received a share of the profits, unless he was known to be a partner; in which case he shall be liable after he has actually ceased to be so, unless he gave notice of his

having quitted the concern; *Evans v. Drummond.* P. 89

2. If two partners give a joint bill of exchange for a partnership demand, and which bill becomes due, and the holder afterwards takes the separate bill of one of them, the other is discharged. *S. C.*
3. If a tailor engages in a whaling voyage, and is to receive a certain proportion of the profits of the voyage in lieu of wages, when the cargo is sold, he may maintain an action for his wages against the captain; and shall not be considered as a partner. *Wilkinson v. Frazier.* 182

Particular.

1. The Plaintiff's demand must correspond with the evidence; therefore, where the particular specified the cause of action to be on a note only; and on its being produced, it was found to have an improper stamp, the party is precluded by his particular, from going into evidence of the consideration. *Wade v. Beasley.* 7
2. Under a particular of the Plaintiff's demand, stating that the action was brought to recover the amount of a note of hand, interest on it is recoverable when the note is payable by installments; and on failure of any installment, the whole is to become due, the interest is to be calculated on the whole sum remaining unpaid, or in default of any installment; and not on the respective installments, at the respective times when they would become payable. *Blake, executor of Dale, v. Lawrence.*

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Payment.

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Payment.

If a payment has been made by bills, it shall be good evidence; and they shall be presumed to be paid, unless the contrary is shewn. *Hobden v. Hartfink.* 46
Vide Note.

Pleading.

When there are several indorsers of a bill, the Plaintiff may declare on an indorsement by the payee to his immediate indorser, without stating the intermediate ones. *Chaters v. Bell* and others. 210

Promissory Note.

1. When a promissory note has been given for money due by the Defendant to the Plaintiff, who declares on it, together with the money counts, he must prove the note lost or destroyed, before he can have recourse to the money counts, if it appears that the money so claimed was that for which the note was given. *Dangerfield v. Wilby.* 159
2. The indorsee of a promissory note may maintain an action for money had and received against the maker. *Dimsdale* and others *v. Lanchester.* 201

S.

Sailor.

If a sailor engages on a whaling voyage, and is to receive a certain proportion of the profits of the voyage, in lieu of wages, when the cargo is sold, he may maintain an action for his wages against the captain; and shall

not be considered as a partner. *Wilkinson v. Frazier.* 182
Vide Country (Foreign)

Sale.

1. In an action for money had and received, to recover back a deposit on a sale, on the ground of a defect of title, the party bringing the action must prove the title bad; and it shall not be sufficient to shew that the title has been deemed insufficient by conveyancers, who have been employed to advise upon it. *Camfield v. Gilbert.* 221
2. Under the general count for money paid, the buyer of the property shall not recover the expences of investigating the title, if it turns out to be a bad one. *Camfield v. Gilbert.* 221

Sample.

Vide Goods.

Set-off.

1. A poundage agreed to be paid to a person for recommending customers, is illegal, and cannot be made the object of set-off. *Wyburd v. Staunton.* 179
2. When an annuity is void for a defect in the memorial, and the grantee brings an action to recover the consideration, the grantees, under a plea of set-off, may give in evidence the whole of the payments made on account of the annuity; but if any account of more than six years standing, the Plaintiff should reply the statute of limitations. *Hills v. Hills.* 196
3. A guarantee, to the amount of a certain sum of money given for a third person, cannot be set off. *Crawford* and others *v. Stirling.* 297
Sheriff.

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Sheriff.

Where more money has been taken for a bail-bond than the law allows, but not by the officer to whom the warrant was directed, but by another, no action lies against the sheriff. *George v. Perring.* Page 63

Ship.

1. The register at the custom-house is conclusive evidence of the ownership of a ship. *Marsh v. Robinson.* 98
2. A captain of a ship who has entered into engagements on account of her, acquires thereby a lien on the goods and freight, to the extent of his engagements. *White v. Baring.* 22

Slander.

In an action for slanderous words imputing dishonesty to the Plaintiff, the declaration is not supported by proving words which may import such a meaning, but are equivocal, and may have a different import. *Harris v. Stratton.* 218

Society (Friendly)

A bond, conditioning for the production of a box, containing the subscriptions of a Friendly Society, need not be stamped. *Carter v. Bond.* 253

Sound List.

Vide Evidence.

Stage-Coach.

When carriers give notice that they will not be liable for goods

lost, beyond the value of 5*l.*, that extends to the property of passengers going by the coach, or other carriage; and not to goods sent to be carried only. *Clark v. Gray.* Page 177

Stamp.

A bond, conditioning for the production of a box, containing the subscriptions of a Friendly Society, need not be stamped. *Carter v. Bond.* 253

Statute (Penal)

1. In debt *qui tam*, under the stat. for usury, the day laid in the declaration is material, though laid under a *sciz.*; and any variance from it is fatal. *Harris qui tam, v. Hudson.* 152
2. To subject a party to the penalties of the statute 25 *Geo. II. c. 36*, for keeping a house for illegal dancing and music, it is not necessary that the party who kept the house should take money for admission. *Archer v. Willingrice.* 186
3. The penalty under the Game Certificate Act, for not producing a licence when lawfully required, is not complete by the refusal to produce it, unless the party refuses, on request, to tell his christian and surname, and place of his residence. *Molten v. Rogers.* 215
4. An unqualified and unlicensed person may join in the sport with a person lawfully entitled to kill game, if he merely joins in the sport, and is not himself a principal, or using his own dogs. *Molten v. Rogers.* 217

Suit.

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Suit.

The existence of a suit in a particular term may be proved by the declaration; but not the commencement of the suit itself. *Matthews v. Haigh.* Page 100

T.

Tenant.

Though a building may be raised on a brick foundation, and have a brick chimney, if the erection on such foundation is of wood, and the building be used for the purposes of trade or manufacture, the tenant may remove it at the end of his term. *Penton v. Roberts.* 22
Vide *Assumpsit*, 2.

Tender.

1. Though the Plaintiff disputes the quantum of the sum proposed to be tendered, and says he will not accept of it; to constitute a legal tender, some money must be produced, though not the actual or specific sum. *Dickenson v. Shee.* 67
2. Where a tender has been made in Term, prior, in fact, to the commencement of the action, and the declaration is entitled generally of the term; as it refers to the first day, the Defendant should compel the Plaintiff to entitle his declaration specially, or he cannot give the tender in evidence. *Rolfe v Norden.* 72
3. Plea of tender, and replication of subsequent demand and refusal, a letter sent subsequent to the tender, to the Defendant's

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house by the Plaintiff, and to which an answer is sent out, that it shall be settled, is evidence to go to the jury. *Hayward v. Hague.* Page 94

Terrier.

A terrier or map, not signed by the parishioners or parish-officers, is not evidence of the boundaries of the parish. *Earl v. Lewis.* 1

Tort.

If a party, whose goods have been tortiously taken, brings an action for them, and declares for goods sold and delivered, and the Defendant pays money into court, he cannot set up the *tort* in bar of the action on the contract. *Bennet v. Francis.* 28

In Transitu.

1. To deprive the owner of goods of his right to stop them *in transitu*, it is not necessary that they should be delivered at the consignee's place of abode; it is sufficient if they have come to his possession, and he has exercised on them any act of ownership. *Wright v. Lawes.* 82
2. When goods have been ordered by an agent, who has a power of disposing of them as he thinks fit, for his principals, if they come to his possession, though not to his principals, they cannot be stopped *in transitu*. *Leeds v. Wright.* 243

Trespass.

To entitle a party to maintain trespass for the mesne profits, it

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is not necessary to execute an *habere*, if the Plaintiff has been let into possession by the Defendant. *Calvert v. Horsfall.* Page 167

Trover.

1. Where goods are delivered under a contract, as to do something with them, and to deliver them according to the party's undertaking, an omission of the party's doing what he so undertook to do, will not sustain an action of trover, unless there has been an actual refusal to deliver. *Severin v. Kephell.* 156
2. Where an injury has been done to a chattel belonging to another, in endeavouring to do a service to such person out of charity, or to prevent mischief from the act of such person, an action of trover will not lie for it. *Drake v. Shorter.* 165

U.

Unlicensed House.

To subject a party to the penalties of statute 25 Geo. II. c. 36, for keeping a house for illegal dancing and music, it is not necessary that the party who kept the house should take money for admission. *Archer v. Willingrice.* 186

Use and Occupation.

Where an agreement is entered into by deed to demise premises, but by words, not amounting to an actual demise, assumpsit for use and occupation may be maintained. *Elliot v. Rogers.* 59

Usury.

1. If the payee of a note given for usurious consideration, arrests the maker, who, to procure his liberation, prevails on a third person to join him in another note to the amount of the debt, the usury which affected the first note shall not affect the second; and it is, therefore, no defence to an action on it. *Turner v. Hulme.* 14
2. A count in debt for usury, stating it to be committed in a loan from *A.* to *B.* is supported by shewing that *B.* was indebted to *A.* as the maker of a note, of which *A.* was the indorsee; and on its becoming due, that *A.* gave further time for the payment of it. *Manners, q. t. v. Postan.* 241

Variance.

In debt, *qui tam*, under the statute for usury, the day laid in the declaration is material, though laid under a *seiz.*; and any variance from it is fatal. *Harris, q. t. Hudson.* 152

W.

Wages.

If a sailor engages on a whaling voyage, and is to receive a certain proportion of the profits of the voyage in lieu of wages, when the cargo is sold, he may maintain an action for his wages against the captain; and shall not be considered as a partner. *Wilkinson v. Frazier.* 182

Will

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Will.

1. Where a will is impeached on the ground of fraud, and the witnesses are dead, evidence is admissible as to what their characters were when living. *Doe ex dem. Stephenson v. Walker.* Page 50
2. When the witnesses to a will are dead, and forgery is imputed, or the procuring of the will by improper means, evidence, as to the character of the witnesses, is admissible. S. C.

Witness.

1. The drawer of a bill of exchange is a good witness to prove the Defendant's acceptance, even though forgery of it is imputed to the witness. *Dickenson v. Prentice.* 32
2. Where a will is impeached on the ground of fraud in procuring it, and the subscribing witnesses are dead, evidence to their characters when living, is admissible. *Doe ex dem. Stephenson v. Walker.* 50
3. If a witness, called by the Plaintiff, has been examined, cross-examined, and quitted, and the Defendant finds it necessary afterwards to call him back to prove his plea, the Defendant's counsel is not bound to examine him as in chief, but may put to him leading questions, as on cross-examination. *Dickenson v. Shee.* 67
4. A witness cannot be cross-examined as to what he swore in an affidavit, unless the affidavit be produced. *Sainthill v. Bound.* 74
5. Where an action is brought by several owners of a ship, a re-

lease from one of them will be sufficient to make an interested witness competent. *Hocklefs v. Mitchell.* Page 86

6. Where a witness comes to swear that he would not believe another on his oath, what questions may be asked him. *Mawson v. Hartfink.* 102
7. In an action for a debt due by several partners, one of them, who has not been joined in the action, cannot be made a witness for the Defendant by having a release from him only. *Cheyne v. Koops.* 120
8. To prove a title to the lessee of premises in an action of trespass, for breaking and entering them, the lessor is an inadmissible evidence. *Smith v. Chambers.* 164
9. In a joint ejectment against two, one of whom suffers judgment to go by default, and the other takes defence, the Defendant who has let judgment go by default is a good witness to prove the other in possession. *Doe on the demise of Harroff v. J. Green and G. Green.* 198
10. A witness cannot be asked a question which tends to disgrace or degrade him. *Rex v. Lewis and others.* 225
11. How far a witness may be examined as to matters tending to disgrace or degrade him. *Macbride v. Macbride.* 242
12. In an action on a policy of insurance on goods, the supercargo, who was to have had a share in the profits of the adventure, is a good witness, where the goods were lost before they were sold. *Robertson v. French.* 246
13. A bill of parcels, on which was written, "Settled, by one bill at

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- at three and another at nine months," is not admissible in evidence, unless it is stamped. *Smith v. Kelly.* Page 249
14. When an instrument, executed in the presence of a subscribing witness, is offered in evidence, whether in chief in the cause against the Defendant, or collaterally, it must be proved by the subscribing witness: nor shall the admission of the execution of it, by the party who executed it, be received. *Manners, q. t. v. Postan.* 239
15. An arbitrator may be called to prove what matters were claimed before him, on a reference. *Martin v. Thornton.* 181

Words.

In an action for slanderous words,

imputing dishonesty to the Plaintiff, the declaration is not supported by proving words which may import such a meaning, but are equivocal, and may have a different import. *Harrison v. Stratton.* 218

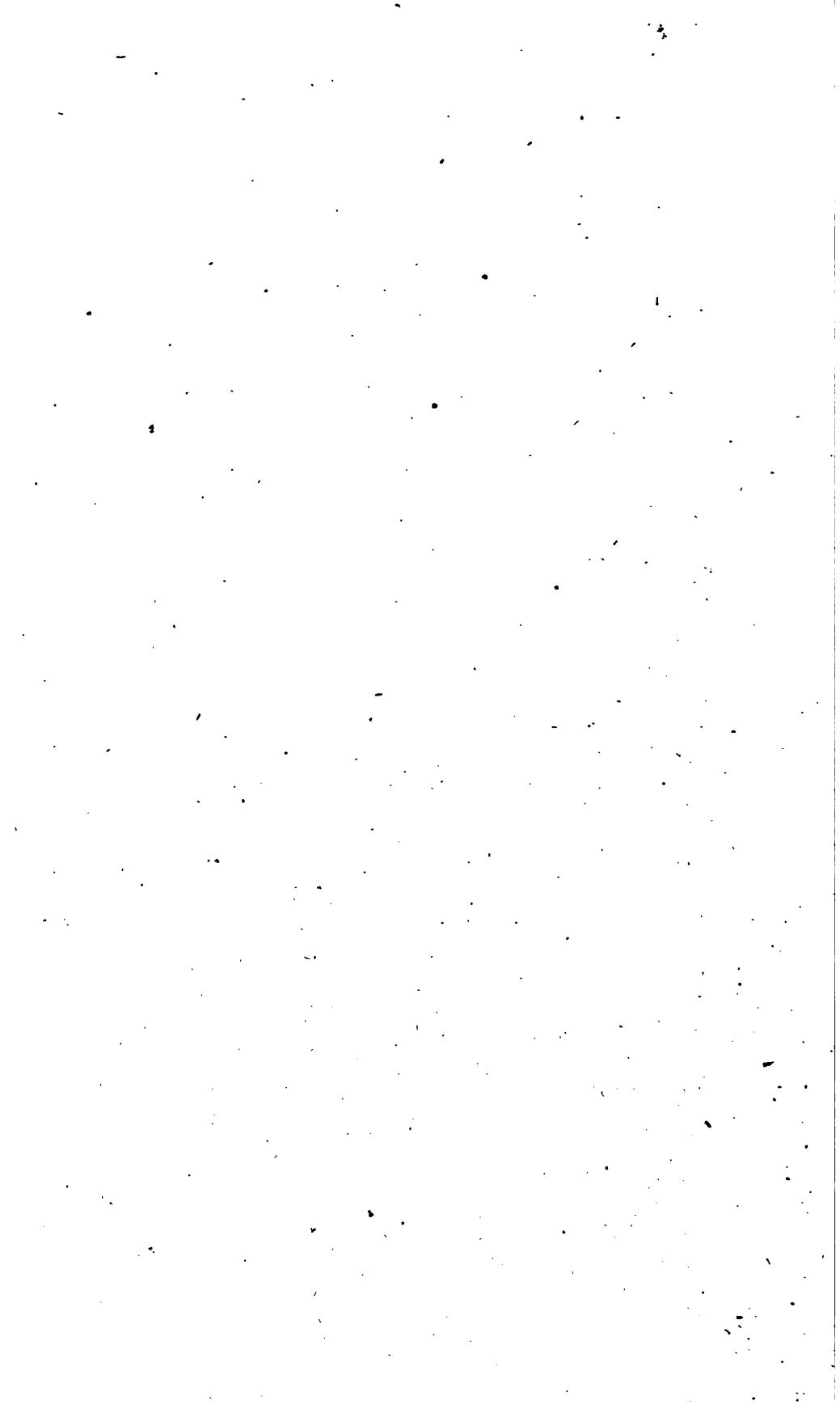
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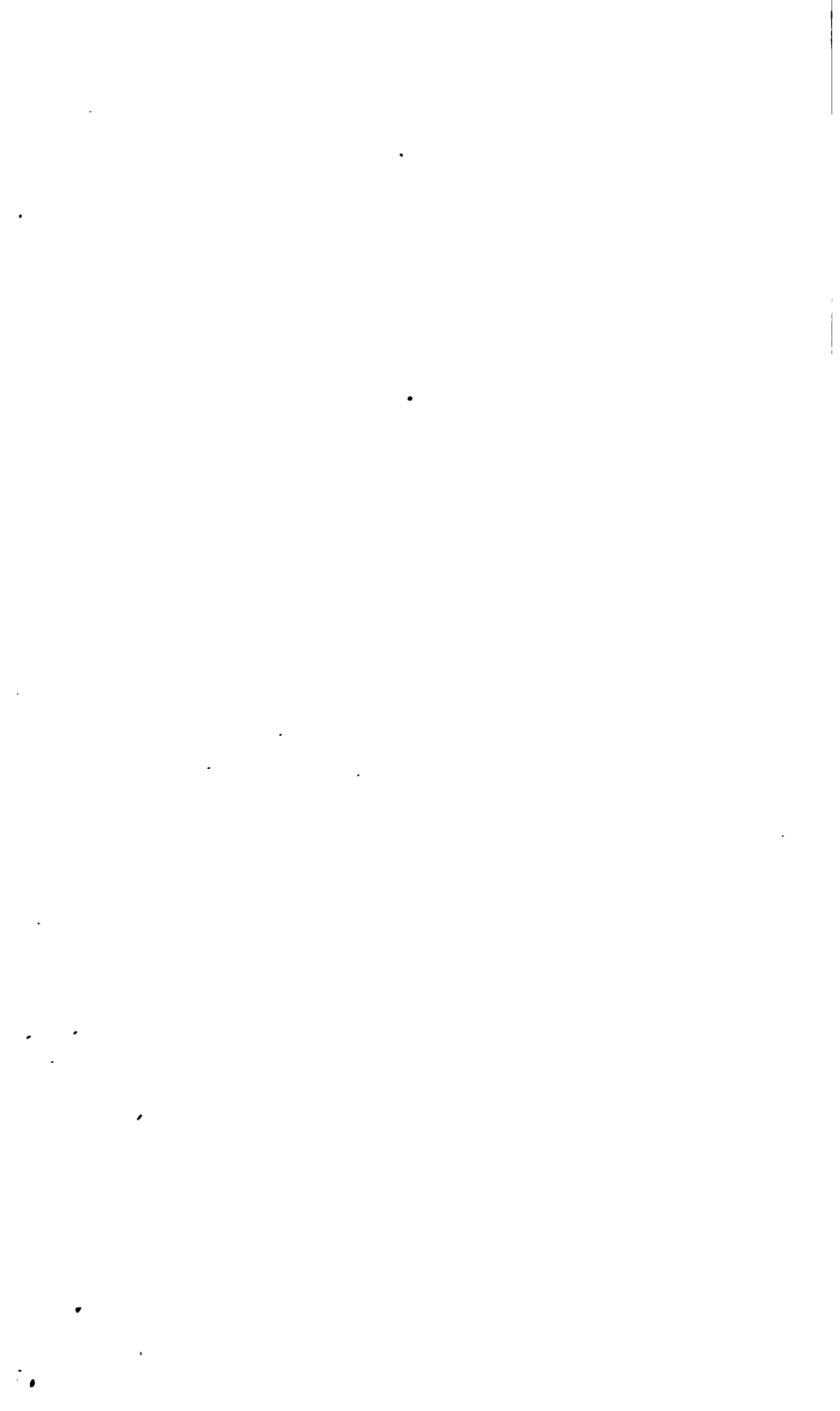
To prove that a writ issued in a particular cause, it is not sufficient to prove the *præcipe* by the filazer's book, and to give notice to the party to produce it; it should be shewn that, after the return, the Treasury was searched, and no such writ found; and that it was in the party's hands, who had notice to produce it. *Edmondstone v. Plaisted, Gent.* 160

END OF VOL. IV.

ERRATA.

Page.	Line.
7	9, for <i>Lessee</i> read <i>Lessor</i>
26	in the margin, first point, line ult. for <i>Lessee</i> read <i>Lessor</i>
13	in the margin, for <i>sues</i> read <i>is sued by</i>
14	9, for <i>registered</i> read <i>entered</i>
34	29, dele <i>them</i>
30	4, for <i>tertious</i> read <i>tortious</i>
85	last line but three, for <i>on</i> read <i>against</i>
125	27, for <i>resufciated</i> read <i>resuscitated</i>
142	last line but one, for <i>was</i> read <i>is</i>





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